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AIDS, Employment and Unemployment

ARTHUR S. LEONARD*

By the fall of 1988, the Centers for Disease Control (CDC) of the United States Public Health Service had received reports of more than 75,000 cases of Acquired Immune Deficiency Syndrome (AIDS), and in New York City, which has had the largest number of cases of any city in the nation since the beginning of the epidemic, the City Department of Health's AIDS Surveillance Unit had received reports of over 17,000 cases.¹ During an average month in 1982, the City Department of Health received reports of 31 new cases of AIDS. In an average month during 1987, 312 cases were reported, and monthly figures for early 1988 were higher than the 1987 averages.² Workplaces around the nation were increasingly affected by AIDS. A nationwide survey reported early in 1988 that ten percent of the companies responding to the survey had experienced an employee with AIDS.³

During 1987, public health officials in New York City noted a change in the epidemiology of AIDS in the city. Although "sex with man at risk" remained cumulatively the largest risk classification behavior among men with AIDS since the epidemic began, "IV drug use" had grown to rival it as a leading risk behavior among those men whose diagnoses were reported since January 1, 1988, and had always been the largest risk category among women in New York City.⁴ The future of the epidemic, at least in New York City, will be significantly different from its past. What has been regarded until now as primarily a sexually transmitted disease

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1. Statistical data taken from N.Y. CITY DEPT. OF HEALTH AIDS SURVEILLANCE UNIT, AIDS SURVEILLANCE UPDATE 1 (Oct. 26, 1988). [hereinafter AIDS UPDATE]. Given the rate of new case reporting, the national figure of 74,566 as of October 17 would easily have become over 75,000 within a few weeks. As of October 1988, New York City had 23% of the cases reported in the United States.

2. *Id.* Preliminary data for 1988 showed the following numbers of new AIDS cases reported: January-June: an average of 420 cases reported each month; July-444; August-486; September-512. According to the health department, reporting can lag up to 6 months after diagnosis. *Id.*

3. See *One in Ten Employers Reports Having Employees Suffering From AIDS*, Daily Lab. Rep. (BNA) No. 28, at A-9 (Feb. 11, 1988). The survey, undertaken by Alexander & Alexander Consulting Group, was described as "the largest employer survey to date on the workplace impact of AIDS."

4. *Id.* at 3. As of October 26, 1988, 59% of reported cases among men were attributed to "sex with man at risk;" of those reported since January 1, 1988, only 45% fell into that category. Intravenous (IV) drug use as a risk classification accounted cumulatively for 30% of the cases, but since January 1, 1988, had been implicated in 43% of the cases. Individuals whose behavior placed them in both risk classifications made up 5% of the cumulative total, but 3% of the total since January 1, 1988. Suspected heterosexual transmission from women to men in New York City cumulatively accounted for less than 1% of the cases, and no such cases were reported after January 1, 1988. Heterosexual transmission from men to women accounted for 24% of the cases among woman since January 1, 1988. Based on the first three months of reporting in 1988, the New York City Health Department announced in mid-April that gay and bisexual men were no longer the largest risk group in New York. Health Commissioner Stephen C. Joseph stated: "It has become clear . . . that the gay community has made effective progress in reducing the spread of new infection, unlike the IV drug-using population, where the virus continues to spread virtually unabated." *New York Reports a Shift in AIDS Patients*, N.Y. Times, Apr. 17, 1988, at A40, col. 1. A special report by the Association of the Bar of the City of New York highlights the shifting nature of the epidemic in New York. *AIDS and The Criminal Justice System: A Preliminary Report and Recommendations*, 42 RECORD OF THE ASS'N OF THE BAR OF THE CITY OF N.Y. 901, 903-07 (Nov. 1987).

characteristic of gay, white, employed, middle class men⁵ is gradually transforming into a disease characteristic of economically disadvantaged men and women who use intravenously-administered drugs, a group which is disproportionately black or Hispanic.⁶ Although New York City and its associated metropolitan area may not be fully representative of the country as a whole, it seems likely that educational efforts targeted at change in sexual behavior could cause a similar shift in other parts of the country, at least with regard to new infection.⁷

The statutory and judicial response to AIDS in the workplace has been shaped over the past several years by the advocacy of gay rights and civil liberties organizations.⁸ The emphasis has been on protection from employment discharge and preservation of employment-related benefits. However, it seems clear that future responses will have to take into account that many—perhaps most—of those affected by AIDS will come from chronically unemployed and underemployed groups, groups with fewer social and economic resources to assist them in combating discrimination and to ease the adjustment to a life threatening chronic disease.⁹

The AIDS epidemic is changing in another way. Since the fall of 1986 when federal health officials announced the first successful trials of an experimental drug therapy to inhibit replication of the pathogen believed by researchers to be the cause of immune deficiency in AIDS, Human Immunodeficiency Virus (HIV),¹⁰ those persons with AIDS who have access to sufficient resources to obtain the experimental treatment are likely to be able to live longer with the illness.¹¹ Even if a cure is not

5. See Note, *Characterization and Disease: Homosexuals and the Threat of AIDS*, 66 N.C.L. REV. 226 (1987).

6. In New York City, a minority of the men reported to have AIDS are white. The cumulative figures as of October 26, 1988 showed that of the men reported to have AIDS, 29% were black and 25% were Hispanic. An overwhelming majority of the women reported to have AIDS in New York City are non-white: 52% black and 33% Hispanic. The racial and ethnic nature of the affected populations in New York is even more starkly illustrated by the figures on pediatric AIDS: 58% black and 32% Hispanic. In 72% of the pediatric cases, IV drug use by one of the parents was identified as the probable source of infection. AIDS UPDATE, *supra* note 1, at 3, 8.

7. Risk behaviors are identified by investigation of the behaviors of persons who become ill from AIDS. On the basis of the risk behaviors associated with the disease, epidemiologists concluded prior to the discovery of a particular infectious agent that AIDS was probably spread by a blood-borne agent which was probably not casually transmissible. In 1983, French researchers isolated a previously unknown virus from the blood of persons with AIDS; in 1984, American researchers confirmed the presence of a virtually identical virus in the blood of persons with AIDS; in 1985, the Food and Drug Administration licensed a test for antibodies to this virus, now called Human Immunodeficiency Virus (HIV). While most researchers believe that HIV infection leads to AIDS, there is some dispute on the point. See Boffey, *A Solitary Dissenter Disputes Cause of AIDS*, N.Y. Times, Jan. 12, 1988, at C3, col. 5.

8. The main litigating groups in significant precedential cases have been state affiliates of the American Civil Liberties Union and the two national gay rights legal organizations, Lambda Legal Defense & Education Fund, Inc., and National Gay Rights Advocates.

9. This was dramatically brought home to the writer during a conference on "Minorities and AIDS" at Texas Southern University's Thurgood Marshall School of Law in Houston during September 1987. I spoke as part of a panel on AIDS and employment, emphasizing the possible protections for employees with HIV infection, AIDS Related Complex (ARC), or AIDS. The first question posed to me concerned the extent to which current employment law might provide assistance to persons from largely unemployed and underemployed groups.

10. *First Drug to Show Promise to be Made Widely Available*, 1 AIDS Pol'y & L. (BNA) No. 18, at 8 (Sept. 24, 1986).

11. AIDS is regularly labelled "uniformly fatal" in the mainstream media, but such characterizations are, after all, relative. Life is "uniformly fatal" in that barring some miraculous scientific discovery, everybody now alive will die eventually. In characterizing AIDS as a "fatal disease," we assume that somebody diagnosed with AIDS will die from it within a relatively short period of time. Early in the epidemic, death within 18 months after diagnosis was seen as a typical outcome. New treatments may lengthen the survival time significantly. According to the New York City Department of Health figures, as of October 26, 1988, more than half of those diagnosed during the first half of 1987 were still alive, and some people were still alive who had been diagnosed with AIDS during the earliest years of the epidemic,

found anytime soon, AIDS may eventually be transformed, in many cases, to a chronic condition managed by medication rather than a fatal condition terminating in significantly premature death.¹²

This change will have important ramifications for employment because individuals with AIDS may be able to work for significantly longer periods of time, and may be less likely (and financially less able) to take disability retirement as an alternative to continued employment. Longer and better quality survival time will place significantly increased burdens on public welfare systems unless the survivors who are able to work can secure and maintain employment and associated health care benefits. The ability of persons with chronic AIDS conditions to obtain employment will become a more significant employment law issue in the future¹³ as discrimination against current employees with AIDS becomes increasingly unacceptable under accumulating legislative and judicial pronouncements.¹⁴ Consequently, hiring practices, and especially "AIDS screening" of applicants, will become more central in discussing AIDS and employment law.

This Article addresses the current status of employees or job applicants with AIDS, Aids-Related Complex (ARC), or who are seropositive.¹⁵ Because existing employment law as currently administered and enforced is inadequate to deal with the problems AIDS generates in the workplace, this Article suggests ways in which the law can be improved to serve the important goal of enhancing the quality of life of those affected by the epidemic in a manner consistent with the medical and economic health of our society.

I. DEVELOPING LAW OF AIDS AND EMPLOYMENT: HANDICAP DISCRIMINATION STATUTES

A. Federal Law

During the first few years of the AIDS epidemic, the most heavily debated legal question concerning AIDS and employment has been whether AIDS could be

more than six years previously. AIDS UPDATE, *supra* note 1, at 2. See also, Callen, *I Will Survive*, Village Voice, May 3, 1988, at 31-35 (anecdotal account of long-term survivors of AIDS).

12. See *New Study Sees Lower Costs for AIDS Care*, N.Y. Times, May 26, 1988, at B17, col. 6; Ricklets, *Living With AIDS: Thanks to New Drugs, Patients Are Surviving and Working Longer*, Wall St. J., Sept. 2, 1988, at 1, col. 1.

13. Panelists at the annual meeting of the President's Committee on Employment of the Handicapped, held May 4 and 5, 1988, in Washington, asserted that the handicapped have the highest rate of unemployment of any minority group in the United States. *Among Handicapped, Mentally Disabled Face Greatest Employment Bias Problems*, Daily Lab. Rep. (BNA) No. 94, at A-5 (May 16, 1988). Persons with AIDS are now routinely recognized as being "handicapped" for purposes of applicable law and statistical record keeping.

14. See *infra* text accompanying notes 17-131.

15. This article is not intended to duplicate prior articles by the author, but to update prior treatment of the developing case law and to point out areas for further development of the law dealing with AIDS and employment. See Leonard, *Employment Discrimination Against Persons With AIDS*, 10 U. DAYTON L. REV. 681 (1985) [hereinafter *Employment Discrimination*]; Leonard, *AIDS and Employment Law Revisited*, 14 HOFSTRA L. REV. 11 (1985) [hereinafter *AIDS and Employment Law*]; Leonard, *AIDS in the Workplace*, in AIDS AND THE LAW: A GUIDE FOR THE PUBLIC 109-25 (H. Dalton & S. Burris eds. 1987); Leonard, *AIDS as a Handicapping Condition Under Federal and State Employment Discrimination Laws*, in PROCEEDINGS OF 40TH ANNUAL NATIONAL CONFERENCE ON LABOR ch. 12 (N.Y. Univ 1987) [hereinafter *Handicapping Condition*].

conceptualized as a "handicapping condition"¹⁶ so as to bring it within the scope of existing civil rights laws prohibiting employment discrimination against "otherwise qualified handicapped individuals."¹⁷ When this question first arose in the context of AIDS in 1983 and 1984, there were no reported employment law decisions dealing with the question whether contagious conditions were covered by handicap discrimination laws.

The only published opinion of any relevance to the "contagious condition" issue at the beginning of the epidemic was *New York State Association of Retarded Children v. Carey*,¹⁸ a 1979 Second Circuit decision which dealt with the applicability of section 504 of the Federal Rehabilitation Act¹⁹ (Act) to a dispute over whether mentally impaired school children who were infected by hepatitis B virus (HBV) should be segregated from noninfected mentally impaired students. Advocates for the infected children predicated federal jurisdiction on their mental impairments, not their HBV infection, and the court dealt with the case as a matter of discrimination between mentally impaired children with HBV infection, and children without mental impairments with HBV infection.²⁰

In determining whether the mentally impaired children with HBV infection were "otherwise qualified" to be integrated into the general student population of the special education program, the court focused on the question whether HBV infection would pose a significant risk of infection to other students in the program, as to which the school bore the burden of proof.²¹ Concluding that competent medical evidence

16. Parry, *AIDS as a Handicapping Condition: Part I*, 9 MENTAL & PHYS. DISABILITY L. REP. 402 (1985); Parry, *AIDS as a Handicapping Condition: Part II*, 10 MENTAL & PHYS. DISABILITY L. REP. 2 (1986).

17. Rehabilitation Act of 1973, § 504, 29 U.S.C. § 794 (1982). Section 504 does not have the wide ranging private sector application of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 (1982 & Supp. IV 1986), or the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-34 (1982 & Supp. IV 1986). Rather, section 504 of the Rehabilitation Act applies by its terms to "any program or activity receiving Federal financial assistance." In *Grove City College v. Bell*, 465 U.S. 555 (1984), the Supreme Court construed similar language in Title IX of the Education Amendments of 1972 to restrict applicability of federal nondiscrimination requirements to the actual program or activity which receives direct federal money, rather than to all operations of the entity whose program receives the assistance. The practical effect of *Grove City* was to narrow applicability of four similarly worded civil rights laws, including section 504. In 1988, Congress overrode a presidential veto to enact the Civil Rights Restoration Act of 1987, P.L. 100-259, 102 Stat. 28 (1988), which was primarily intended to reverse the *Grove City* ruling. The Restoration Act has even greater significance for the subject matter of this article, explored in fuller detail *infra* text accompanying notes 54-71. As to what constitutes federal financial assistance for purposes of jurisdiction, the Supreme Court held in *Department of Transp. v. Paralyzed Veterans of Am.*, 477 U.S. 597 (1986), that only direct monetary payments to a program or activity will subject it to nondiscrimination requirements of section 504. This interpretation was partially overridden with respect to discrimination against passengers by airlines in the Air Carrier Access Act of 1986, P.L. 99-435, 100 Stat. 1080 (1986), but was otherwise left intact by the Restoration Act. See S. REP. NO. 100-64, 100th Cong., 2d Sess. 29, reprinted in 1988 U.S. CODE CONG. & ADMIN. NEWS 3, 31. The Rehabilitation Act also affects employment by federal agencies, see 29 U.S.C. § 791 (1982), and employment under federal contracts, see 29 U.S.C. § 793 (1982). As to the former, the Federal Office of Personnel Management issued policy guidelines on dealing with AIDS in the federal workplace on March 22, 1988. *Sections I and II of OPM's AIDS Guidelines for Federal Employers*, Daily Lab. Rep. (BNA) No. 56, at A-10, D-1 (Mar. 23, 1988). The Guidelines adopt nondiscrimination principles consistent with the case law developments discussed in this article.

Numerous states and localities have enacted civil rights laws prohibiting discrimination on the basis of handicaps or disabilities. See *Employment Discrimination*, *supra* note 15, at 690-96 (summary of state handicap discrimination law as of 1985).

18. 612 F.2d 644 (2d Cir. 1979).

19. 29 U.S.C. § 794 (1982).

20. *New York State Assoc.*, 612 F.2d at 649.

21. *Id.* at 649-50.

showed that "the health hazard posed by the hepatitis B carrier children" was no more "than a remote possibility,"²² the court declared that the children were protected from discriminatory treatment under the Act because "a significant health risk" would not result from their integration with uninfected, mentally impaired children in the classroom.²³

Carey turned out to be prophetic with regard to AIDS, even though HBV infection was not the impairment central to the court's analysis in that opinion. In *School Board of Nassau County, Florida v. Arline*,²⁴ the case that brought the question of contagious conditions as handicaps to the Supreme Court, the Court adopted in essence the crucial test the Second Circuit had articulated in *Carey* for determining whether an infected person was "otherwise qualified" to participate in a program subject to the Act—"significant risk."²⁵ And, in *Chalk v. U.S. District Court*,²⁶ the first federal appellate ruling applying the Act to a dispute over AIDS in the workplace, the Ninth Circuit reversed the district court²⁷ on precisely this point, holding that absolute certainty that transmission could not occur from schoolroom or workplace contact was not necessary in order to provide protection under the law.²⁸

But the question of "otherwise qualified" is, of course, the second step in handicap discrimination law analysis. The first step is determining whether someone is a "handicapped individual," and the attribution of that status to persons infected by HIV or suffering AIDS or ARC was only recently firmly established by court decisions and legislative action.

The earliest reported judicial opinion to apply the Act to AIDS was *District 27 Community School Board v. Board of Education*,²⁹ a case similar to *Carey* that involved a demand by parents that school children with AIDS be excluded from attending school with uninfected children.³⁰ The court held that "since [the virus] destroys certain lymphocytes, a person with AIDS clearly has . . . a 'physical impairment,' " and is thus within the definition of a "handicapped individual" under the Act.³¹ Further, the court held that a person with a record of infection by HIV would

22. *Id.* at 650.

23. *Id.* at 651.

24. 480 U.S. 273 (1987), *reh'g denied*, 107 S. Ct. 1913 (1987) (tuberculosis is a "handicapping condition" under section 504).

25. In *Arline*, the Court stated: "A person who poses a significant risk of communicating an infectious disease to others in the workplace will not be otherwise qualified for his or her job if reasonable accommodation will not eliminate that risk." *Id.* 480 U.S. at 287 n.16.

26. 840 F.2d 701 (9th Cir. 1988).

27. The district court's opinion, which is not officially published, can be found unofficially reported as *Doe v. Orange County Dep't of Educ.*, 44 Fair Empl. Prac. Cas. (BNA) 1579 (C.D.Cal. 1987).

28. *Chalk*, 840 F.2d at 709. *Chalk* involved a high school special education teacher with AIDS who was denied reinstatement to a classroom teaching position after his physician certified him as able to return to work. *Id.* at 703-04. *Chalk* sued for reinstatement under section 504, and moved for a preliminary injunction reinstating him to classroom teaching pending trial of his case. *Id.* at 704. The district court denied preliminary injunctive relief, relying primarily on an affidavit by a doctor who asserted his "hunch" that all means of HIV transmission had not yet been discovered. *Doe v. Orange County Dep't of Educ.*, 44 Fair Empl. Prac. Cas. (BNA) 1579, 1581 (C.D. Cal. 1987).

29. 130 Misc.2d 398, 502 N.Y.S.2d 325 (Sup. Ct. 1986).

30. *Id.* 130 Misc.2d at 400-01, 502 N.Y.S.2d at 328.

31. *Id.* 130 Misc.2d at 414, 502 N.Y.S.2d at 336. Relevant definitions for the terms used in section 504 are contained in 29 U.S.C. § 706 (1982); handicapped individuals are defined as persons who have, *inter alia*, physical impairments, as well as those with records of such impairments or who are regarded as having such impairments. For a similar analysis predating the court's decision in *District 27*, see *Employment Discrimination*, *supra* note 15, at 691 (1985).

be covered by the definitional category of "record of an impairment,"³² and students with AIDS who "were automatically excluded from school" would be "regarded as having" an impairment.³³ Thus the court swept into the category of "handicapped individual" all persons infected by HIV, regardless of whether they had developed symptoms of ARC or AIDS.³⁴ Noting the evidence that HBV was "far more contagious" than HIV,³⁵ the court concluded that exclusion of school children with AIDS would be inconsistent with the ruling in *Carey* and violative of section 504.³⁶

In the employment sphere, however, the leading precedent prior to the Supreme Court's 1987 decision in *Arline* was the Eleventh Circuit's 1985 decision in that same case.³⁷ Gene Arline was discharged as an elementary school teacher after suffering her third relapse of tuberculosis, which she initially contracted as a teenager.³⁸ She sued under section 504, claiming that she was an "otherwise qualified handicapped individual" who was being excluded from participation in a "program or activity receiving federal financial assistance."³⁹ The district court concluded that she was not handicapped within the meaning of the statute, asserting that "it's difficult for this court to conceive that Congress intended contagious diseases to be included within the definition of a handicapped person. . . ."⁴⁰

The district court needed to speculate about Congress' intent with respect to inclusion of contagious conditions because the legislative history of the Act is barren of any expressed consideration of the question. The court of appeals drew the opposite conclusion to that of the district court from this lack of expressed legislative intent, noting the broad and vague language Congress used to define handicapped individuals. The court of appeals then asserted that the critical question, once one concedes that a particular contagious condition produces impairment or causes a person to be treated as if they were impaired, is whether the person afflicted with a contagious condition was "otherwise qualified" to participate in the covered program.⁴¹ The court of appeals remanded the case for the district court to consider without clearly articulating a standard by which the district court could weigh the evidence.⁴²

Commentators on employment discrimination and AIDS immediately seized

32. *District 27*, 130 Misc. 2d at 415, 502 N.Y.S.2d at 337.

33. *Id.* 130 Misc. 2d at 414, 502 N.Y.S.2d at 326.

34. The court prefaced its analysis of the Rehabilitation Act issues with a citation to *Carey*, acknowledging the similarity of the cases. *Id.* 130 Misc. 2d at 413-14, 502 N.Y.S.2d at 336.

35. *Id.* 130 Misc. 2d at 415, 502 N.Y.S.2d at 337.

36. *Id.* 130 Misc. 2d at 415-16, 502 N.Y.S.2d at 337.

37. *School Bd. of Nassau County, Fla. v. Arline*, 772 F.2d 759 (11th Cir. 1985), *aff'd*, 480 U.S. 273 (1987).

38. *Id.* at 760.

39. *Id.* at 760-61.

40. *Id.* at 759 (quoting the district court opinion).

41. *Id.* at 764.

42. *Id.* at 764-65. The court stated:

The court is obligated to scrutinize the evidence before determining whether the defendant's justifications reflect a well-informed judgment grounded in a careful and open-minded weighing of the risks and alternatives, or whether they are simply conclusory statements that are being used to justify reflexive reactions grounded in ignorance or capitulation to public prejudice.

Id. (citation omitted). The court cited *Carey* in support of this proposition, but failed expressly to invoke *Carey*'s standard of significant risk.

upon the Eleventh Circuit's *Arline* decision as the key precedent with regard to AIDS.⁴³ The Supreme Court's grant of certiorari in *Arline* in the spring of 1986,⁴⁴ focusing specifically on the question whether a person with a contagious condition could be a "handicapped individual" under the Rehabilitation Act definition,⁴⁵ set off more speculation about the applicability of handicap discrimination law to the AIDS situation. The United States Justice Department (Department) issued a memorandum a few months after the grant of certiorari, asserting that discrimination against persons infected with HIV or suffering ARC or AIDS would not be unlawful if prompted by fears of contagion, however unreasonable such fears might be.⁴⁶ The Department made the same argument with respect to tuberculosis as an amicus in the *Arline* case.⁴⁷

The Supreme Court, in an opinion by Justice Brennan,⁴⁸ rejected the Department's argument, agreed with the Eleventh Circuit, and held that the broad purpose embodied in section 504 justifies extending coverage to persons with contagious conditions which satisfy the definition of "handicapped individual." The Court also held that the crucial question is whether the actual risk of contagion is significant enough to render the individual not "otherwise qualified."⁴⁹ In determining whether a person afflicted with a contagious condition was "otherwise qualified," the Court said that "appropriate weight" must be given to "such legitimate concerns of grantees as avoiding exposing others to significant health and safety risks."⁵⁰ Thus, the Court clarified the central issue left ambiguous by the Eleventh Circuit: in order

43. See Leonard, *The Legal Issues*, in AIDS: THE WORKPLACE ISSUES 33 (1985); *AIDS and Employment Law*, *supra* note 15, at 14 n.21, 26 n.75; see also Feerick, *AIDS in the Workplace*, 195 N.Y.L.J. 1 (1986); Kandel, *Current Developments in EEO—AIDS in the Work Place*, 11 EMPL. REL. L.J. 678 (1986); Parry, *supra* note 16; Comment, *AIDS and Employment: An Epidemic Strikes the Workplace and the Law*, 8 WHITTIER L. REV. 651 (1986); Comment, *AIDS and Employment Discrimination Under the Federal Rehabilitation Act of 1973 and Virginia's Rights of Persons with Disabilities Act*, 20 U. RICH. L. REV. 425 (1986); Note, *AIDS: Does It Qualify as a "Handicap" Under the Rehabilitation Act of 1973?*, 61 NOTRE DAME L. REV. 572 (1986); Note, *Employment Discrimination and AIDS: Is AIDS a Handicap Under Section 504 of the Rehabilitation Act?*, 38 U. FLA. L. REV. 649 (1986); Note, *Recent Developments: Public Health and Employment Issues Generated by the AIDS Crisis*, 25 WASHBURN L.J. 505 (1986); Recent Developments, 9 HARV. J.L. & PUB. POL'Y 739 (1986).

44. *School Bd. of Nassau County, Fla. v. Arline*, 475 U.S. 1118 (1986).

45. *Id.* In its petition for certiorari, the School Board raised three issues: whether the "contagious, infectious disease of tuberculosis" constituted a handicap under section 504; whether the small amount of federal aid the district received subjected it to federal civil rights jurisdiction under section 504, and whether the eleventh amendment would shield the Board from legal redress in federal court. See 54 U.S.L.W. 3588 (U.S. Mar. 3, 1986). The Court granted certiorari on only the first question, but requested the parties to "brief and argue" as well the question whether someone "afflicted with the contagious, infectious disease of tuberculosis is precluded from being 'otherwise qualified' from the job of elementary school teacher, within the meaning of Section 504. . . ." *Arline*, 475 U.S. at 1118 (1986). Justice Stevens dissented from the addition of this second question "before the District Court has an opportunity to make the findings ordered by the Court of Appeals." *Id.*

46. *Memo from Assistant Attorney General Cooper on Application of Section 504 of Rehabilitation Act to Persons with AIDS*, Daily Lab. Rep. (BNA) No. 122, at D-1 (June 25, 1986). The Cooper Memorandum has been effectively revoked by a new memorandum. See *Justice Department Memorandum On Application of Rehabilitation Act's Section 504 to HIV-Infected Persons*, Daily Lab. Rep. (BNA) No. 195, at D-1 (Oct. 7, 1988).

47. *Arline*, 480 U.S. at 282 n.7.

48. Joining the majority opinion were Justices White, Marshall, Blackmun, Powell, Stevens, and O'Connor. Chief Justice Rehnquist filed a dissenting opinion, joined by Justice Scalia.

49. *Arline*, 480 U.S. at 281-88. The Court commented: "Allowing discrimination based on the contagious effects of a physical impairment would be inconsistent with the basic purpose of § 504, which is to ensure that handicapped individuals are not denied jobs or other benefits because of the prejudiced attitudes or the ignorance of others." *Id.* 480 U.S. at 284.

50. *Id.* 480 U.S. at 287 (footnote omitted) (emphasis added).

for a risk of contagion to render an individual *not* otherwise qualified, it must be "significant."⁵¹

Subsequent to *Arline*, the *Chalk* decision⁵² created a firm precedent applying section 504 to employees with AIDS, and it is clear, from both the Supreme Court's explanation of its holding in *Arline* and the Ninth Circuit's discussion of medical authorities in *Chalk*, that the Act's protection extends to persons with AIDS or those likely to encounter discrimination due to their actual or perceived status as "AIDS virus" carriers.⁵³

The *Arline* decision was not without its detractors.⁵⁴ Because of its probable application to the AIDS situation, some congressional critics attempted to reverse the decision during consideration of the Civil Rights Restoration Act of 1987.⁵⁵ Senator Gordon J. Humphrey (R., N.H.) proposed an amendment specifically intended to overrule *Arline*, but the amendment was defeated in committee by a vote of 14-2.⁵⁶ On the Senate floor, a compromise was devised by which the Humphrey amendment became the Harkin-Humphrey amendment, essentially codifying the Supreme Court's approach in *Arline* to the "otherwise qualified" issue.⁵⁷

As enacted, the Harkin-Humphrey amendment provides, in pertinent part:

For the purpose of sections 503 and 504, as such sections relate to employment, such term does not include an individual who has a currently contagious disease or infection and who, by reason of such disease or infection, would constitute a direct threat to the health or safety

51. See *supra* text accompanying notes 24-25 (discussing *Arline* in context of *Carey* at beginning of this section of article). On remand for trial, Gene Arline was reinstated as an elementary school teacher. *Arline v. School Bd. of Nassau County, Fla.*, 692 F. Supp. 1286 (M.D. Fla. 1988).

52. *Chalk v. U.S. District Court*, 840 F.2d 701 (9th Cir. 1988).

53. The Supreme Court specifically reserved the question whether an asymptomatic carrier of a contagious disease could be considered "impaired" as required by the Rehabilitation Act definition, since the question was not presented by Ms. Arline's case. *Arline*, 480 U.S. at 282 n.7. However, subsequent decisions seem to answer the question affirmatively. See, e.g., Local 1812, Am. Fed'n of Gov't Employees v. United States Dep't of State, 662 F.Supp. 50 (D.D.C. 1987) (diplomatic personnel and applicants who test positive for HIV antibodies considered handicapped individuals for purposes of analysis under Rehabilitation Act, but found not otherwise qualified for overseas assignment). This is consistent with the purpose of the Act, since discrimination motivated by fear of contagion, regardless whether the individual has outward symptoms of illness, is precisely the sort of discrimination at which the Act is aimed. See *Handicapping Condition*, *supra* note 15, at § 12.04[2]; Note, *Asymptomatic Infection with the AIDS Virus as a Handicap Under the Rehabilitation Act of 1973*, 88 Col. L. Rev. 563 (1988). See also, *Doe v. Centinela Hospital*, 57 U.S.L.W. 2034 (C.D. Cal. July 19, 1988) (Relief against discrimination was granted to a man who had been discharged from an alcoholism rehabilitation program for testing seropositive.). The foregoing interpretation of federal law now has the imprimatur of the Justice Department, see *Justice Department Memorandum On Application of Rehabilitation Act's Section 504 to HIV-Infected Persons*, Daily Lab. Rep. (BNA) No. 195, at D-1 (Oct. 7, 1988).

54. Its first detractors were Chief Justice Rehnquist and Justice Scalia, who dissented from the Court's decision. Rehnquist endorsed the Justice Department's argument that exclusion of somebody from a workplace because of fear of contagion is *not* discrimination "by reason of . . . handicap." *Arline*, 480 U.S. at 291 (Rehnquist, C.J. dissenting). Rehnquist also noted the lack of any evidence in legislative history or subsequent regulatory materials that Congress intended to include persons with contagious conditions under section 504's coverage. *Id.* 480 U.S. at 292-93 (Rehnquist, C.J. dissenting).

55. Pub. L. No. 100-259, 102 Stat. 29, 31-32 (1988). The pertinent portions of the Act relevant to this article are section 4, which adds to section 504, 29 U.S.C. § 794, a definition of the term "program or activity" for the purposes of overruling the *Grove City* case, see *supra* note 18; and section 9, which amends section 7(8), 29 U.S.C. § 706(8), to clarify the application of section 503 (federal contractors) and section 504 (federal financial recipients) to persons impaired by contagious conditions.

56. S. REP. NO. 100-64, 100th Cong., 2d Sess. 31, reprinted in 1988 U.S. CODE CONG. & ADMIN. NEWS 3, 33.

57. 134 CONG. REC. S256-57 (daily ed. Jan. 28, 1988).

of other individuals or who, by reason of the currently contagious disease or infection, is unable to perform the duties of the job.⁵⁸

The phrase "would constitute a direct threat to the health or safety of other individuals" seems to create new ambiguity.⁵⁹ Under the *Arline* decision, section 504 protects an infected individual unless that individual's condition would create a *significant risk* of workplace contagion.⁶⁰ Does the "constitute a direct threat" standard contained in the Restoration Act work any change in the standard the Court enunciated in *Arline*?

To clarify the meaning of this "clarification" of the Rehabilitation Act, Senators Tom Harkin (D., Iowa) and Gordon Humphrey read a prepared colloquy into the record, consisting of several questions and answers.⁶¹ Unfortunately, the colloquy does not provide any enlightenment on the issue of the appropriate test for a court to apply in a section 504 case because no attempt is made to define the phrase "constitute a direct threat." However, the colloquy does make clear that with regard to the issue of "reasonable accommodation" of handicaps attributable to contagious conditions, the amendment does not change existing law as set forth in *Arline*.⁶²

Consideration of the Restoration Act in the House of Representatives provides more direct evidence of an intent in that chamber to codify the *Arline* standard in section 9 of the Restoration Act.⁶³ Many proponents of the legislation inserted statements in the record making clear their understanding that section 9 would provide protection against discrimination for persons with AIDS, some specifically

58. Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 29, 31-32 (1988) (to be codified at 29 U.S.C. § 706(8)).

59. At least one commentator, evidently unaware of the legislative history recounted above, has asserted: "Under a strict interpretation of the Harkin-Humphrey amendment, employers now may have a less restrictive burden to meet in defending against AIDS-related employment discrimination suits brought under the Rehabilitation Act." Hentoff, *A Legal Virus on Top of the AIDS Virus*, N.Y. Times, Apr. 16, 1988, at A31, col. 2. Mr. Hentoff, a law student, also asserts that the Harkin-Humphrey amendment removes any requirement for employers to "accommodate" people infected by the "AIDS virus." Hentoff's interpretation is not mandated by the language of the amendment, and is contrary to the legislative history, see *infra* notes 61-65 and accompanying text. His views are developed at greater length in Note, *The Rehabilitation Act's Otherwise Qualified Requirement and the AIDS Virus: Protecting the Public From AIDS-Related Health and Safety Hazards*, 30 ARIZ. L. REV. 571 (1988).

60. *School Bd. of Nassau County, Fla. v. Arline*, 480 U.S. 273, 287 (1987).

61. 134 CONG. REC. S256-57 (daily ed. Jan. 28, 1988).

62. Since the colloquy may become important in future interpretation of sections 503 and 504, its pertinent text is reproduced here:

Mr. HUMPHREY. Mr. President, I would like to address several questions to the Senator from Iowa, relative to his understanding of this amendment...

Is it your understanding that this amendment is designed to address an issue comparable to the one faced by Congress in 1978 with regard to coverage of alcohol and drug abusers under section 504 of the Rehabilitation Act? That is, Congress wishes to assure employers that they are not required to retain or hire individuals with a contagious disease or infection when such individuals pose a direct threat to the health or safety of other individuals or cannot perform the essential duties of a job. Mr. HARKIN. If the Senator would yield, yes, Senator, that is my understanding. Mr. HUMPHREY. I thank the Senator for that response. Inquiring further, is it the Senator's understanding that this amendment does nothing to change the current laws regarding reasonable accommodation as it applies to individuals with handicaps . . . ? . . . Mr. HARKIN. . . . Yes, indeed, that is my understanding. Mr. HUMPHREY. Finally, is it the Senator's understanding, as we stated in 1978 with respect to alcohol and drug abusers, that the two-step process in section 504 applies in the situation under which it was first determined that a person was handicapped and then it is determined that a person is otherwise qualified? Mr. HARKIN. Yes. I do understand—yes, that is my understanding.

134 CONG. REC. S256-57 (daily ed. Jan. 28, 1988) (nonsubstantive portions omitted). For a discussion of existing law on "reasonable accommodation," see *infra* text accompanying notes 68-72.

63. House floor debate occurred on March 2, 1988. 134 CONG. REC. H565 (daily ed. Mar. 2, 1988).

referring to the *Arline* standard of "significant risk."⁶⁴ A leading opponent of the Restoration Act argued against the bill because of his understanding that it would leave the *Arline* interpretation in place instead of overruling it.⁶⁵

Consequently, it seems likely that the Restoration Act works no change in the law regarding AIDS and employment under the Rehabilitation Act, at least as developed so far in cases depending upon *Arline* as precedent.⁶⁶ If anything, the Harkin-Humphrey amendment preserves the *Arline* approach from subsequent judicial redefinition by writing it directly into the statute. This is a flexible approach to the issue of "otherwise qualified," because the Supreme Court clearly conditioned the degree of protection afforded an employee with a contagious condition upon developing medical knowledge and the possibility of accommodating the handicap of the employee.⁶⁷

The *Arline* decision was significant not only with respect to the definition of "handicapped individual" and "otherwise qualified," but also with respect to the issue of "reasonable accommodation." Section 504 makes no mention of any requirement that employers accommodate the handicaps of otherwise qualified applicants or employees, but subsequent regulations sought to impose that requirement administratively.⁶⁸ In *Arline*, the Court specified that: "[e]mployers have an affirmative obligation to make a reasonable accommodation for a handicapped

64. See 134 CONG. REC. H565-66 (daily ed. Mar. 2, 1988) (statement of Rep. Garcia); 134 CONG. REC. H566 (daily ed. Mar. 2, 1988) (Statement of Rep. Hayes); ("The bill also codifies court rulings that provisions of the Rehabilitation Act that prohibit employment discrimination against disabled persons applies to those with a contagious disease or infection (such as AIDS), unless the disease constitutes a direct threat to the health or safety of others or the disease prevents them from performing their jobs."); 134 CONG. REC. H567-68 (daily ed. Mar. 2, 1988) (Statement by Rep. Hawkins) ("This amendment is consistent with the holding and standards announced by the Supreme Court in the recent case of School Board of Nassau County versus Arline . . . It is important to note that the purpose of the amendment is to clarify, and not to modify or alter, the substantive protections afforded individuals with contagious diseases and infections under the Rehabilitation Act."); 134 CONG. REC. H569 (daily ed. Mar. 2, 1988) (Statement of Rep. Miller); 134 CONG. REC. H571 (daily ed. Mar. 2, 1988) (statement by Rep. Jeffords) ("[t]he Harkin-Humphrey amendment places within the terms of the Rehabilitation Act the otherwise qualified standard now set forth in regulations and case law. In brief, the Harkin-Humphrey amendment adopts the approach and standards of the Supreme Court's *Arline* decision . . . [T]here would have to be a determination that there is a significant risk of transmission of the disease or infection to others in the work place, a risk which could not be eliminated by reasonable accommodation."); 134 CONG. REC. H573 (daily ed. Mar. 2, 1988) (statement of Rep. Weiss) ("The basic manner in which individuals with contagious diseases and infections can present a direct threat to the health or safety of others in the workplace is if there is a significant risk that the individual could transmit the contagious disease or infection to other individuals . . . [T]he amendment does nothing to change the requirements in the regulations and case law regarding providing reasonable accommodations for persons with contagious diseases or infections. . . ."); 134 CONG. REC. H574 (daily ed. Mar. 2, 1988) (statement of Rep. Owens) ("With or without this statutory amendment, under current law, as interpreted by the Supreme Court last year in *School Board of Nassau County versus Arline*, the standards applied in any given case would be the same."); 134 CONG. REC. H575 (daily ed. Mar. 2, 1988) (statement of Rep. Waxman) ("While this legislation does not make substantive change in the law as it has been interpreted by both the Supreme Court and lower courts, it does add some clarity to those holdings.").

65. 134 CONG. REC. H579-80 (daily ed. Mar. 2, 1988) (statement of Rep. Dannemeyer).

66. The draft report prepared for consideration by the President's Commission on the HIV Epidemic by its Chairman, Admiral James Watkins, reaches this conclusion: "It appears that this amendment is in concert with the *Arline* decision and codifies the existing standards applicable to Section 504." See *Excerpts from Draft Recommendations Prepared by Chairman of the President's Commission on AIDS*, Daily Lab. Rep. (BNA) No. 107, at D-1, D-5 (June 3, 1988).

67. The Court adopted an analytical framework proposed in an amicus curiae brief filed by the American Medical Association, which asserted that the decision should be based on "reasonable medical judgments given the state of medical knowledge," and that courts should defer to the judgments of public health officials. *Arline*, 480 U.S. at 238.

68. 45 C.F.R. § 84.3(k) (1985).

employee.”⁶⁹ Referring to its earlier decisions under section 504, the Court elucidated the scope of the accommodation requirement in a lengthy footnote which implicitly places the imprimatur of the Court on existing regulations.⁷⁰ These regulations specify that an accommodation will be considered unreasonable if it imposes “undue financial and administrative burdens” on a federal funding recipient, or requires “‘a fundamental alteration in the nature of [the] program.’”⁷¹ As such, it is clear that the accommodation requirement is limited in scope, since significant inconvenience or expense may not be required. What this will mean in practical terms for employees affected by AIDS is unclear, but the current medical evidence indicates that no particular changes are necessary in the typical workplace to protect coworkers or members of the public from exposure to HIV through casual contact with infected employees.⁷²

B. State and Local Laws

Almost all the states and some county and municipal jurisdictions have laws or ordinances forbidding handicap discrimination.⁷³ Most of these apply broadly throughout the private sector. During the past few years, there have been several important administrative⁷⁴ and judicial decisions⁷⁵ establishing that most of these laws will provide some protection to persons suffering employment discrimination because of AIDS.⁷⁶ In a few jurisdictions, however, the handicap discrimination laws

69. *Arline*, 480 U.S. at 289 n.19.

70. *Id.* 480 U.S. at 287 n.17.

71. *Id.* (quoting from *Southeastern Community College v. Davis*, 442 U.S. 397, 412 (1979), and referring to 45 C.F.R. § 84.12(c) (1985) and 45 C.F.R. § 84, app. A (1985)).

72. For an example of an accommodation scheme devised to settle an employment discrimination case brought by a neurologist with AIDS who had been restricted from hospital privileges, see *Neurologist with AIDS Reaches Agreement with Cook County Hospital on Work Practices*, Daily Lab. Rep. (BNA) No. 42, at A-3 (Mar. 3, 1988).

73. See *Employment Discrimination*, *supra* note 15, at 689-96 (1985); *AIDS and Employment Law*, *supra* note 15, at 21 n.52 (1985); AIDS LEGAL GUIDE 2-1-2-2 (A. Rubinfeld ed. 1988).

74. Perhaps the most important administrative decisions were *Shuttleworth v. Broward County Office of Budget and Mgmt Pol'y*, 2 Empl. Prac. Guide (CCH) ¶ 5014 (1986), Daily Lab. Rep. (BNA) No. 242, at E-1 (Dec. 17, 1985) (Fla. Comm'n on Human Relations, Dec. 11, 1985) (first published administration decision holding employment discrimination against a person with AIDS to be violative of state handicap discrimination law); *Racine Educ. Ass'n v. Racine United School Dist.*, Daily Lab. Rep. (BNA) No. 98, at E-1 (May 21, 1988) (Wis. Dep't Indus. Lab. Human Relations, Apr. 30, 1986) (AIDS exclusionary policy adopted by School Board violates state law against discrimination on the basis of handicap or sexual orientation); *Department of Fair Empl. and Housing v. Raytheon Co.*, Daily Lab. Rep. (BNA) No. 29, at E-1 (Feb. 13, 1987) (Cal. Fair Empl. & Housing Comm., Feb. 5, 1987), *aff'd*, 46 Fair Empl. Prac. Cas. (BNA) 1089 (Cal. Super. Ct. 1988) (refusal to allow employee with AIDS to resume work violates state handicap discrimination law; preliminary, injunctive relief would be appropriate in future cases of AIDS-related employment discrimination, given shortened expected lifespan of persons with AIDS); *Isbell v. Sebastian's*, West Virginia Human Rights Comm'n (Jan. 15, 1988) (discussed in *First W.Va. AIDS Bias Case Is Won by Waiter in Parkersburg*, Daily Lab. Rep. (BNA) No. 22, at A-2 (Feb. 3, 1988) (waiter unlawfully discharged after presenting doctor's report showing he was seropositive; employer allegedly told waiter he was fired because of rumors he had AIDS).

75. *Cronan v. New England Tel. Co.*, 41 Fair Empl. Prac. Cas. (BNA) 1273 (Mass. Super. Ct. 1986) (rejecting motion to dismiss handicap discrimination claim by telephone lineman with AIDS alleging constructive discharge; also upholding count in violation of Massachusetts privacy statute for unauthorized disclosure of confidential information by company officials); *Raytheon Co. v. Fair Empl. & Housing Comm'n*, 46 Fair Empl. Prac. Cas. (BNA) 1089 (Cal. Super. Ct., 1988) (affirming Commission decision against employer in AIDS-discrimination case). The Raytheon decision provides the most exhaustive discussion of medical evidence in any judicial opinion published at the time of writing.

76. Perhaps the most significant of these recent decisions is *Raytheon*, 46 Fair Empl. Prac. Cas. (BNA) 1089 (Cal. Super. Ct. 1988), in which a California Superior Court judge noted the broadly remedial scope of California handicap discrimination law as defined in *American Nat'l Ins. Co. v. Fair Empl. and Housing Comm'n*, 32 Cal. 3d 603, 186 Cal. Rptr. 345 (1982) (man with high blood pressure protected from employment discrimination as handicapped) and held that

specifically exclude coverage for persons with contagious diseases⁷⁷ or have received interpretations placing in doubt their efficacy in protecting persons with HIV infection or milder cases of ARC who encounter discrimination.⁷⁸

Several states and cities have passed statutes specifically dealing with AIDS and employment. In California,⁷⁹ Florida,⁸⁰ Maine,⁸¹ Massachusetts,⁸² Texas,⁸³ Vermont,⁸⁴ and Washington,⁸⁵ it is unlawful for employers to demand HIV antibody tests of applicants for employment or current employees.⁸⁶ Municipal ordinances have been enacted in several large California cities,⁸⁷ as well as Austin, Texas.⁸⁸ Also, mayors, municipal councils, and state agencies have proclaimed nondiscrimination policies with respect to state and local employment.⁸⁹

Although state and local laws vary in their language and interpretation, there are few states where AIDS related discrimination would not be covered to some extent.

exclusion of a person with AIDS from the workplace at a time when his doctor had authorized return to work was unlawful under Govt. Code § 12926(H). *Raytheon*, 46 Fair Empl. Prac. Cas. at 1094.

77. GA. CODE ANN. § 34-6A-3(b)(2) (1988); KY. REV. STAT. ANN. § 207.140(2)(c) (Baldwin 1981); TENN. CODE ANN. § 8-50-103(c) (Supp. 1987). An argument can and should be made that such laws should be interpreted only to exempt from coverage handicapping conditions which are transmissible under workplace circumstances, but it is uncertain whether such arguments would be successful.

78. In *Wolfe v. Tidewater Pizza, Inc.*, No. C87-662 (Cir. Ct., Norfolk, Va. 1987) a trial judge held that the Virginia Rights of Persons With Disabilities Act, VA. CODE ANN. §§ 51.01-40 (Michie 1987) provided no protections for persons not actually impaired. The case involved an employee who was suspended from work for four weeks due to rumors that he had AIDS. The employer required him to present a doctor's certification that he was not infected by HIV. An appeal is pending before the Virginia Supreme Court. See 2 LAMBDA AIDS UPDATE 3-4 (June/July 1987); 2 LAMBDA AIDS UPDATE 4 (Oct. 1987).

Similarly, in *Chevron Corp. v. Redmon*, 745 S.W.2d 314 (Tex. 1987), the Texas Supreme Court adopted a restrictive definition of handicap, limiting protection to "persons with impairments of an incapacitating nature," or, alternatively stated, "in order for a disability to be considered a handicap in the first place it must be one which is generally perceived as severely limiting him in performing work-related functions in general." *Id.* at 318. The case involved a person with a slight visual impairment which resulted in disqualification for employment as a laborer. The approach taken by the Texas court seems likely to restrict the protection of Texas handicap discrimination law to persons severely incapacitated by symptoms of ARC or AIDS; unfortunately, those persons are unlikely to be "otherwise qualified" to work, meaning that Texas handicap discrimination law may actually provide little protection unless either the state legislature is willing to overrule the case or the court reconsiders its precedential value in a case involving HIV related discrimination.

79. CAL. HEALTH & SAFETY CODE, § 199.22 (West 1979).

80. 1988 Fla. Sess. Law. Serv. ch. 88-380, § 43 (West).

81. ME. REV. STAT. ANN. tit. 5, §§ 19201-06 (Supp. 1987).

82. MASS. ANN. LAWS ch. 111, § 70F (Law. Co-op Supp. 1988).

83. TEX. REV. CIV. STAT. ANN. art. 4419b-1 (Vernon Supp. 1988).

84. H. 239, enacted May 9, 1988, effective July 1, 1988. See *Vermont Bans HIV Status Discrimination in Employment, Education, Health Care*, 95 Daily Lab. Rep. (BNA) No. 95, at A-10 (May 17, 1988).

85. 1988 Wash. Legis. Serv. ch. 206, § 903 (West).

86. The listed states all have statutes which either expressly or by clear implication would forbid employers from demanding HIV tests. Of course, in all states with handicap discrimination laws applicable to the AIDS situation, it is likely that such testing would be unlawful.

87. Municipal ordinances are normally not published in the commercial reporting services upon which employment law researchers rely. Due to extraordinary interest in AIDS, however, the CCH Employment Practices Manual has published the Los Angeles and San Francisco ordinances. LOS ANGELES, CAL. ORDINANCE No. 160289 (Aug. 16, 1985), reprinted in, 3 Empl. Prac. Guide (CCH) ¶ 20,950A (1985); SAN FRANCISCO, CAL. ORDINANCE No. 49985 (Dec. 20, 1985), reprinted in, 3 Empl. Prac. Guide (CCH) ¶ 20, 950B (1985).

88. AUSTIN, TEX. CODE §§ 7-4-120 - 133 (1986).

89. Agencies or executives who have promulgated such policies include the Mayor of Boston, Massachusetts, the Minnesota Department of Employee Relations, the Missouri Department of Health, and the Denver, Colorado, city council. See *Individual Employee Rights Manual*, Lab. Rel. Rep. (BNA) No. 9A, at 509:206 (Feb. 1988).

Nevertheless, a national legislative solution is needed to compensate for the gaps in state and local law.⁹⁰

C. *The Limitations of Handicap Discrimination Law*

One of the main limitations of handicap discrimination law in meeting the legitimate needs of people affected by AIDS is the lack of a national standard for disability discrimination laws. As noted above, the Federal Rehabilitation Act reaches only employers with federal contracts or receiving federal money, leaving large gaps in coverage, and some states do not provide protection against handicap discrimination in the private sector.

Early in 1988, it appeared that this gap in federal coverage might be filled by the AIDS Federal Policy Act of 1987.⁹¹ As introduced in the House of Representatives on July 30, 1987, with 43 bipartisan co-sponsors, this bill would have amended the Public Health Service Act⁹² to forbid discrimination in employment against otherwise qualified individuals if the discrimination was based on their infection with "the etiologic agent for acquired immune deficiency syndrome."⁹³ The bill would have also expanded the federal effort for voluntary HIV antibody testing and counseling, which, in fact, was the main focus of the bill. On May 26, 1988, this bill received overwhelming approval from the House Subcommittee on Health and the Environment, but with the antidiscrimination provisions removed due to a perceived lack of support for this part of the bill in the full House.⁹⁴

Another bill, more sweeping in its potential impact, would amend various titles of the Civil Rights Act of 1964⁹⁵ to include physical and mental disabilities on the list of forbidden bases for discrimination in employment and public accommodations.⁹⁶

90. A prime example of this problem is Tennessee, where the legislature amended the state's handicap discrimination law in 1987 to exclude contagious diseases from the definition of handicap in reaction to the *Arline* decision. The legislature amended Tennessee Statute § 8-50-103 to add subsection (c), which excludes from coverage as a handicap "any disease or condition which is infectious, contagious or similarly transmittable to other persons." See TENN. CODE ANN. §8-50-103(c) (1987). Inaccurate legislative perceptions of the contagion issue have been a significant stumbling block in pursuing rational policies with regard to AIDS. Other states which specifically exclude contagious conditions from civil rights law coverage are noted *supra* note 77. Of course, a small number of states lack handicap discrimination law coverage in general.

91. H.R. 3071, 100th Cong., 1st Sess. (1987).

92. 42 U.S.C. §§ 201-300cc-15 (1982 & Supp. IV 1986), would be amended by adding a new Title XXIII — Acquired Immune Deficiency Syndrome, beginning with 42 U.S.C. § 2301.

93. Proposed 42 U.S.C. § 2341(a)(1), H.R. 3071, 100th Cong., 1st Sess. (1987), as introduced. The bill would also have reinforced existing protections under the Rehabilitation Act in proposed 42 U.S.C. § 2341(a)(2), which would have forbidden discrimination based on "AIDS" infection by any program or activity that receives federal financial assistance. The proposal built in the *Arline* standard for "otherwise qualified" in proposed § 2341(b), by providing an exception to the bill's protections where "a public health officer makes a bona fide medical determination that the individual will, under the circumstances involved, expose other individuals to a significant possibility of being infected with such etiologic agent . . ." (emphasis supplied). The companion bill in the Senate, introduced by Senator Edward M. Kennedy, is S. 1575.

94. *House Subcommittee Approves AIDS Counseling, Testing Measure*, Daily Lab. Rep. (BNA) No. 105, at A-4 (June 1, 1988). According to BNA's report, the antidiscrimination provisions were dropped from the bill as part of negotiations over 14 amendments proposed by Rep. Dannemeyer. The measure eventually passed the Congress, but missing the provisions covering discrimination and confidentiality of HIV antibody test results. See Molotsky, *Congress Passes Compromise AIDS Bill*, N.Y. Times, Oct. 14, 1988, at A12, col.1.

95. 42 U.S.C. §§ 2000e-2000e-17 (1982 & Supp. IV 1986).

96. The companion bills are H.R. 4498, 100th Cong., 2d Sess. (Apr. 29, 1988), and S. 2345, 100th Cong., 2d Sess. (Apr. 28, 1988). The bills have bipartisan sponsorship in both houses. See *Comprehensive Handicapped Civil Rights*

This would essentially replicate at the level of federal commerce power the general jurisdictional sweep of state handicap discrimination laws in those jurisdictions which have such laws.⁹⁷

However, extending handicap discrimination laws as currently interpreted and administered throughout the private sector will not necessarily solve the problem. Professor Wendy Parmet has noted in a perceptive article⁹⁸ that placing AIDS and AIDS related statuses within the scope of handicap discrimination law does not provide a comprehensive solution to the work related problems people with AIDS confront. This is partly due to one of the basic premises of handicap discrimination law: protection is provided only to persons who are otherwise qualified to be present in the workplace,⁹⁹ and the accommodations which employers can be required to make in order to render handicapped persons able to perform their jobs are relatively limited.¹⁰⁰ Thus, as soon as a person with AIDS becomes too debilitated to work, or finds it impossible to maintain acceptable attendance or levels of physical effort, protection from handicap discrimination law, including protection for work related benefits, may cease.

A recent decision by the Eighth Circuit in *Beauford v. Father Flanagan's Boys' Home*¹⁰¹ illustrates this limitation. Boys' Home provided employees with three benefits relevant to the case: disability insurance, a salary continuation program for temporarily disabled employees, and health and dental benefits.¹⁰² Beauford, an employee who became unable to work due to physical and emotional ailments, was discharged by Boys' Home. An arbitrator overruled the discharge and restored her employment status, but she remained unable to work. She applied for all three enumerated benefits, but was awarded only disability insurance; the employer claimed she "was denied salary continuation and health insurance because she would not submit to a physical examination."¹⁰³ Beauford charged discrimination violative of section 504.¹⁰⁴

The court of appeals held that the denial of benefits was not covered under section 504 because Beauford was not an "otherwise qualified handicapped individual."¹⁰⁵ She was *unable* to work due to physical and mental impairments;

Bill with Bi-partisan Backing Introduced in House, Senate, Daily Lab. Rep. (BNA) No. 84, at A-8 (May 2, 1988). In addition to employment, these bills would forbid handicap discrimination in public accommodations and transportation.

97. The final report for the President's Commission on the HIV Epidemic strongly endorses establishment of a national policy on handicap discrimination by passage of the pending Americans With Disabilities bill. See Daily Lab. Rep. (BNA) No. 107, at D-1, D-5 (June 3, 1988); Boffey, *AIDS Panel's Chief Urges Ban on Bias Against Infected*, N.Y. Times, June 3, 1988, at A-1, col.6. See also *Reagan Pledges Follow-up on Group's Final Report*, 3 AIDS Pol'y & L. (BNA) No. 12, at 2 (June 29, 1988).

98. Parmet, *AIDS and the Limits of Discrimination Law*, 15 LAW, MED. & HEALTH CARE 61 (Summer 1987).

99. *Southeastern Community College v. Davis*, 442 U.S. 397 (1979).

100. Parmet, *supra* note 98, at 62-64. The Supreme Court emphasized these limitations in *Arline* when it reiterated earlier holdings that "accommodation" requirements were limited in cost and did not require substantial changes in work duties or transfers to less demanding positions (unless such transfers were normally available to similarly situated employees under the employer's usual policies.) *Arline*, 480 U.S. at 287 nn.16-17, 289 n.19.

101. 831 F.2d 768 (8th Cir. 1987).

102. *Id.* at 770.

103. *Id.*

104. Boys' Home received federal funding, and was thus subject to section 504 nondiscrimination requirements. *Id.* at 770.

105. *Id.* at 772 (quoting 29 U.S.C. § 794 (1982)).

consequently, she could not be considered otherwise qualified, even though she was also quite obviously a "handicapped person" as defined by the Act.¹⁰⁶

Beauford argued that regulations promulgated by the Department of Health and Human Services¹⁰⁷ required employers not to deprive handicapped employees of benefits, even though they were not otherwise qualified to work. The regulations defined "qualified handicapped person" to mean:

(1) With respect to employment, a handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question; . . . (4) With respect to other services, a handicapped person who meets the essential eligibility requirements for the receipt of such services.¹⁰⁸

Boys' Home argued that because Beauford could not perform the "essential functions of the job," she was not otherwise qualified. She replied that the "other services" portion of the regulation was applicable; as a disabled employee, she claimed to have met the "essential eligibility requirements" for the salary continuation and health insurance programs offered by her employer, precisely because she was unable to work.¹⁰⁹

The court of appeals rejected Beauford's argument, asserting that "the statutory language extends its protection only to the ambit of a potentially functional employment relationship," and that the portion of the regulation upon which Beauford relied had to do *not* with entitlement to employee benefits, but rather with the "wholly [sic] unrelated topic of discrimination by health, welfare and social services providers toward applicants trying to obtain these types of services."¹¹⁰ In essence, the court held that once an employee became unable to work, handicap discrimination law would provide no assistance in securing the work related benefits specifically designed to assist employees who became unable to work.¹¹¹

This interpretation of the protection afforded by section 504 is narrow and literal. The concept of employment discrimination has long embraced not only equal treatment with respect to hiring, promotion, and discharge, but also equal treatment with respect to other terms and conditions of employment, such as fringe benefits.¹¹² If handicap discrimination law protection is interpreted to cease *entirely* when

106. *Id.* at 771.

107. 45 C.F.R. § 84.3(k) (1987).

108. *Id.*

109. *Beauford*, 831 F.2d at 771.

110. *Id.* at 772.

111. The court of appeals summarized its holding as follows:

Discrimination in the handling of salary continuation and health and dental benefits due handicapped employees unable to perform the essential functions of their jobs is an undesirable thing. However, in the end, protection from such discrimination is simply not contemplated under Section 504 of the Rehabilitation Act.

Id. at 773. The court noted, however, that the employee could pursue a claim that denial of such benefits breached her employment contract. Such a claim would have to be dealt with in state court, and would naturally depend on whether her state recognized such a cause of action for a person in her circumstances. Alternatively, and surprisingly unmentioned by the court, is the possibility that Beauford could pursue her rights under a different federal statute, the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1140 (1982), *see infra* text accompanying notes 149-83.

112. Parmet, *supra* note 98, at 62-64. Professor Parmet notes that the courts have had difficulties applying generally established principles of employment discrimination law to the handicapped, precisely because of the requirement of the statutes that persons with handicaps be fully able, apart from their handicaps, to perform the normal requirements of a job before they can be deemed "qualified" and thus protected from discrimination.

employees' impairments render them unable to work, many persons with handicaps will find little assistance from these laws, and one of the laws' articulated purposes—reducing the dependency of handicapped persons on public assistance¹¹³—will be severely undermined. The opportunity to benefit from a salary continuation program or a health insurance program is not the employer's gift; it is deferred compensation earned by working. Denial of such benefits after a person is no longer able to work is discrimination on the basis of the particular condition which gives rise to the disqualification because it is unlikely that employers would routinely deny such entitlements to all those who become eligible for them.

The *Beauford* court was correct in its reading of the regulation concerning "other services," but its narrow approach to the issue of what constitutes discrimination with regard to an employee who is undoubtedly a "handicapped person" within the meaning of the statute, is restrictive and unimaginative. This narrow interpretation also illustrates how the general approach of the federal courts to handicap discrimination law undermines the important social goals underlying handicap statutes.¹¹⁴

Handicap discrimination law has another significant drawback when it comes to protecting the interests of employees affected by AIDS. Because of its limited remedial nature,¹¹⁵ handicap discrimination law may not be much of a deterrent to employers determined to remove people perceived to present a threat of AIDS from their workplaces. Even if a court later orders the employer to reinstate the employee, such a result is unlikely to occur for a considerable period of time, and it is possible that in the interim the employee will have died from AIDS or become so disabled that reinstatement cannot occur.

For example, in the leading California case, *Raytheon Company v. Fair Employment and Housing Commission*,¹¹⁶ John Chadbourne, an employee with AIDS, was excluded from the workplace early in 1984, even though his doctor said he could return to work and public health officials consulted by the company

113. The Congressional declaration of policy in the Rehabilitation Act speaks of "independent living" as a specific goal of the Act. 29 U.S.C. § 701 (1982).

114. As noted previously, *supra* note 111, the court does suggest an alternative remedy based on a contract theory, but fails to mention either the possible alternative remedies based on ERISA, or the looming issue of ERISA preemption of such common law suits. See *infra* text accompanying notes 135–85.

115. Remedies available under handicap discrimination law vary depending upon the statute governing the case. 29 U.S.C. § 794a (1982) provides that remedies available under section 504 be the same as those available under Title VI of the Civil Rights Act of 1964, 78 Stat. 252 (1964) codified as 42 U.S.C. § 2000d (1982) (a jurisdictionally similar statute forbidding discriminatory practices by programs receiving federal funding), but the remedial scope of Title VI is not ideally clear, at least according to one court attempting to cope with this issue in an AIDS discrimination case. *Shuttleworth v. Broward County*, 649 F.Supp. 35, 36–37 (S.D. Fla. 1986) (granting motion to dismiss claim for damages for mental suffering or humiliation on account of AIDS-related employment discrimination under section 504). Generally, federal employment discrimination law has limited individual remedial relief to reinstatement with or without backpay, perhaps accompanied by lost fringe benefits, interest, and attorneys' fees. *Id.* at 37–38. State laws vary with respect to their remedial scope. In New York, the Human Rights Law, N.Y. EXEC. LAW § 297(4)(c) (McKinney 1982), provides for "compensatory damages," which may include payment for mental anguish and damage to reputation in addition to lost wages.

The *Beauford* decision, *supra* text accompanying notes 101–11, raises, at least by implication, the possibility that remedial coverage for benefits to which the employee was entitled might only be available for those times when the employee remained able to work (or at least was only temporarily disabled), thus rendering that portion of the remedy virtually useless for persons with more permanent disabilities.

116. 46 Fair Empl. Prac. Cas. (BNA) 1089 (Cal. Super. Ct. 1988).

confirmed that his presence in the workplace would not present a significant risk to other employees.¹¹⁷ He filed a complaint with the California Department of Fair Employment and Housing on April 24, 1984,¹¹⁸ at which time he was able to work. By the end of July 1984, he was no longer physically able to work full time, even though he continued to work on an occasional basis as an AIDS service volunteer until October 1984, and he died early in January 1985.¹¹⁹ In effect, he was excluded from working for Raytheon during a period of six months when he was physically able to work.

On August 4, 1986, an administrative law judge (ALJ), ruling on a matter of first impression, held in Chadbourne's case that California handicap discrimination law did not apply because not enough was known in early 1984 about the transmissibility of AIDS to justify requiring Raytheon to have reinstated Chadbourne at that time.¹²⁰ The ALJ's decision was subsequently reversed by the Fair Employment and Housing Commission (Commission) in October 1986, and after briefing and further consideration, the Commission issued its opinion on February 5, 1987, ordering backpay to the estate of Chadbourne in the amount of \$4,359.60 with interest beginning from January 20, 1984, the date Chadbourne was refused reinstatement.¹²¹ The Commission also opined that in future cases of AIDS related employment discrimination, the Department of Fair Employment and Housing should consider seeking interim injunctive relief so that the complainant could be employed while still in good health.¹²²

Raytheon appealed this decision to the Superior Court, which ruled more than a year later that Raytheon had indeed violated California law by excluding Chadbourne from the workplace from January 20, 1984, until he became too impaired by AIDS to work toward the end of July 1984.¹²³ Even had Chadbourne exceeded the average lifespan of a person diagnosed with AIDS in 1984, he probably would not have lived to gain eventual reinstatement. The Superior Court decision came about four years after his complaint was filed.¹²⁴

Unfortunately, the California *Raytheon* case is typical of the slow speed with which many early AIDS employment discrimination cases have been handled.¹²⁵ The

117. *Id.* at 1100-01.

118. Department of Fair Empl. and Housing v. Raytheon Co., Case No. FEP 83-84 L1-031p, slip op. at 2 (Aug. 4, 1986) (Lopez, A.L.J.) (slip opinion in possession of the author).

119. *Id.*

120. The judge also noted a similar ruling by the Office of Federal Contract Compliance Programs in a parallel complaint filed by Chadbourne under section 503 of the Rehabilitation Act. *Id.* at 9-10.

121. The Commission refused to award compensatory or punitive damages, although such are available under California law in appropriate cases. Department of Fair Empl. and Housing v. Raytheon Co., Daily Lab. Rep. No. 29, at E-1, E-6-E-8 (Feb. 13, 1987).

122. *Id.* at E-8. "Substantial and irreparable harm will occur, both to the complainant and the public interest in effective enforcement of the Act, without such relief, and there is clearly a substantial probability that the Department will ultimately prevail on the merits of such cases, where only casual co-worker contact is involved." *Id.*

123. Raytheon Co. v. Fair Empl. and Housing Comm'n, 46 Fair Empl. Prac. Cas. (BNA) 1089, 1089 (Cal. Super. Ct. 1988). The court did not address the remedial issues, particularly with regard to interim injunctive relief, which had been raised by the Commission's opinion. Raytheon has filed an appeal in the California Court of Appeal.

124. The Superior Court decision was issued April 22, 1988. *Id.*

125. Of course, the numerous settlements of employment discrimination charges, not officially reported because not resulting in opinions by courts or agencies, undoubtedly occur much more expeditiously than the resolution of a fully litigated matter.

first case of AIDS related employment discrimination processed by the Office for Civil Rights of the United States Department of Health and Human Services under section 504 of the Act took over two years from the filing of the complaint to issuance of a letter finding probable cause to believe the law had been violated. By the time the letter was issued, the complainant had died.¹²⁶ Similarly, the first AIDS employment discrimination case to go through the full hearing process before the New York State Division of Human Rights was filed in 1986. Hearings before an administrative law judge were still taking place in May of 1988, although the complainant had died during the fall of 1987.¹²⁷ While the accumulating precedents on the workplace rights of persons affected by AIDS make it likely that later cases will be somewhat less time consuming, these examples are unfortunately typical in many ways of the delays inherent in administrative processing of complaints.

The best method of circumventing the time lags inherent in administrative procedures is the method suggested by the California Commission in *Raytheon*¹²⁸ and used by plaintiff's lawyers in *Chalk*:¹²⁹ a demand for temporary injunctive relief, restoring the individual to work pending the trial of the case. As the Ninth Circuit analyzed the appropriateness of preliminary injunctive relief in *Chalk*, it is clear that such relief should be available in any discriminatory discharge case involving AIDS as long as: 1) the job involves no more than casual contact between the HIV infected individual and others; 2) the discriminatee's physical and mental ability to work is not seriously in doubt; and 3) there is no relevant significant change in epidemiology of AIDS that would disturb the current weight of authority on the part of public health officials concerning the issue of transmissibility of HIV.¹³⁰

The availability of preliminary injunctive relief in a case involving refusal to hire is more problematic. According to the Ninth Circuit panel in *Chalk*, "[t]he basic function of a preliminary injunction is to preserve the status quo pending a determination of the action on the merits."¹³¹ When the complaint alleges an unlawful discharge, the status quo is interpreted, as in *Chalk*, to be the continued

126. *Hearings Before the House Subcomm. on Intergovernmental Relations and Human Resources*, 99th Cong., 2d Sess. 188-89, 248-86 (Aug. 6, 1986) (Statement of Thomas B. Stoddard, Executive Director, Lambda Legal Def. & Educ. Fund, Inc.).

127. Barbieri, *Judge Grills Baker & McKenzie's Top Partner*, 1 MANHATTAN LAW., May 10, 1988, at 1, 17. The defendant, the New York office of the international law firm Baker & McKenzie, asserts that it was unaware that associate attorney Geoffrey Bowers had AIDS when he was discharged, despite testimony by Division witnesses that Bowers had visible *Kaposi's sarcoma* lesions prior to his discharge. Another case pending before an administrative judge of the New York State Division on Human Rights shows that the Bowers case is not an isolated example; *John Doe v. Westchester County Medical Center*, the case of an unsuccessful applicant for a pharmacist position, is in a hearing stage about two years after filing of the initial complaint. See Gevisser, *HIV Carriers Have Rights Too*, 246 THE NATION, May 21, 1988, at 710.

128. See *supra* note 74.

129. See *supra* note 27.

130. *Chalk v. U.S. District Court*, 840 F.2d 701, 704-12 (9th Cir. 1988). This description of the scenario in which preliminary injunctive relief would be available should not be construed to preclude such relief for all workers who could hypothetically have blood contact with co-workers or members of the general public, but it seems likely that until there is a body of such precedent, courts may be hesitant to award preliminary relief to such persons in the absence of strong testimony from public health officials on the remoteness of the risk of transmission in such circumstances. A useful analogy is provided by *Thomas v. Atascadero Unified School Dist.*, 662 F.Supp. 376 (C.D. Cal. 1987), where the court ordered reinstatement in the classroom of a youngster infected by HIV who had bitten another student, in light of persuasive testimony that HIV is not transmitted through biting.

131. *Chalk*, 840 F.2d at 704.

employment of the plaintiff, but when the complaint alleges refusal to hire, the notion of status quo relief probably would not extend to an *interim* hiring order, especially where there is some dispute as to the applicant's qualifications for the job unrelated to the issue of handicap. Consequently, it is likely that those who encounter discrimination in hiring will not be able to benefit from interim injunctive relief.

II. ALTERNATIVES TO HANDICAP DISCRIMINATION LAW

Employees who lose their jobs once they are physically or mentally unable to work due to HIV related disorders may still have legal protections for some of the incidents of employment—the insurance benefits necessary for their financial ability to cope with AIDS. Rights to such benefits will in most cases be derived from the Employee Retirement Income Security Act (ERISA),¹³² which is broadly pre-emptive of state statutory and common law regulation of employee benefits issues.¹³³ However, if an employer's promise to provide such benefits is found not to amount to an "employee benefit plan" as defined in ERISA,¹³⁴ state contract law principles may be relevant. In addition, since ERISA protections are limited, principles of state contract law should be invoked to enforce the reasonable expectations of employees that the benefits they have earned by their past labor are not suddenly unavailable because of their medical emergency. Court intervention to enforce such expectations would be consistent with the purposes and policies of ERISA.

A. Common Law Contractual Rights

Just as numerous courts have found that express employer policies regarding disciplinary procedures and grounds for termination may rise to the level of enforceable contractual rights,¹³⁵ courts should find that employees discharged due to a disabling condition have contractual rights to employee benefits previously promised by their employer as a term or condition of employment. Employers who promise such benefits are making a unilateral offer for a contract which the employee accepts by working after the offer is made.¹³⁶ As such, the employee has earned the benefit just as he or she has earned wages. When an employee is no longer able to work due to disability, promises of employment related benefits would ripen into entitlements as part of the consideration for past work performance.¹³⁷

These benefits can take a variety of forms, but the most valuable to disabled employees will naturally include short and long term disability insurance, salary

132. 29 U.S.C. §§ 1001–1145 (1982 & Supp. IV 1986).

133. 29 U.S.C. § 1144(a) (1982).

134. 29 U.S.C. §§ 1002(1), (3) (1982).

135. Leonard, *A New Common Law of Employment Termination*, 66 N.C.L. Rev. 631, 649–53 (1988).

136. Cf. *Scoville v. Surface Transit, Inc.*, 39 Misc. 2d 991, 242 N.Y.S.2d 319 (Sup. Ct. 1963) (holding that unilateral contract for pension benefits had been formed when employees worked for period of time stipulated in employer's announced pension policy).

137. The *Beauford* court alluded to this possibility in noting that Ms. Beauford might pursue her claim to benefits as a contract action in the Nebraska state courts. *Beauford v. Father Flanagan's Boys' Home*, 831 F.2d 768, 773 (8th Cir. 1987).

continuation programs, and health and life insurance programs.¹³⁸ As developed more fully below, ERISA provides recourse only in limited circumstances for the loss of these benefits due to termination of employment. A full discussion of ERISA pre-emption of state law actions is beyond the scope of this Article. However, there is authority upon which to build an argument that ERISA should not be interpreted to pre-empt all attempts by employees to enforce contractual rights to benefits when ERISA does not otherwise directly provide relief.¹³⁹

B. Statutory Rights to Benefits

Because of its pre-emptive effect, ERISA may supersede many contractual claims in situations involving large employers. ERISA provides at least two vehicles for disabled employees to claim continued entitlement to benefits: the continuation coverage provisions,¹⁴⁰ and the nondiscrimination provisions.¹⁴¹

1. Continuation Coverage

The continuation coverage provisions of ERISA were enacted in 1986 to address the problem of employees losing group health insurance coverage for themselves and their dependents upon loss of employment.¹⁴² Employees who are beneficiaries under employment related group health plans will qualify for continuation coverage if their employer employs at least twenty persons.¹⁴³ If the employee's coverage under the

138. Once again, the *Beauford* case provides a useful catalog of benefits that a larger employer may afford to employees. *Id.*

139. 29 U.S.C. § 1144 (1982), the ERISA pre-emption provision, has been a fertile source of litigation, due to its sweeping language pre-empting "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in § 1003(a) of this title. . . ." Although it could be argued that a breach of contract action premised on the failure to pay promised benefits theoretically "relate[s] to any employee benefit plan," there is authority for the proposition that ERISA was not intended to preempt a breach of contract suit in all such circumstances. *See Holliday v. Xerox Corp.*, 555 F. Supp. 51, 55 (E.D. Mich. 1982), *aff'd on other grounds*, 732 F.2d 548 (6th Cir. 1984), *cert. denied*, 469 U.S. 917 (1984); *accord*, *Cattin v. General Motors Corp.*, 612 F. Supp. 948, 950 (E.D. Mich. 1985); *see also Ex parte Ward*, 448 So.2d 349 (Ala. 1984) (claim for health insurance benefits in dispute over pre-existing condition clause in plan). In *Holliday*, the federal trial court rejected a motion to dismiss a pendent contract claim with regard to an employment-related benefit, stating:

[T]he preemption problem is irrelevant to the existence of a valid contract because nothing in ERISA indicates that Congress intended to make contracts unenforceable. Rather, if the state law is preempted, then the contract must be construed in accordance with federal law, in this case the federal common law of contract. There is no substantial body of federal common law of contract. Thus, state law will be looked to as a guide.

Holliday, 555 F.Supp. at 55.

140. 29 U.S.C. §§ 1161-68 (Supp. IV 1986). For a more detailed consideration of the continuation coverage provisions than what follows herein, see Cowley, *Snakebite: A COBRA Warning*, 66 TAXES 315 (May 1988). Regulations have not yet been adopted interpreting these provisions, and there is no reported case law.

141. 29 U.S.C. §§ 1140-41 (1982).

142. *See* 29 U.S.C. § 1163 (Supp. IV 1986), which describes "qualifying events" that will entitle an individual who is a beneficiary under an employee benefit plan to apply for continuation coverage, pursuant to 29 U.S.C. § 1161(a) (Supp. IV 1986). The continuation coverage applies only to "group health plans," not to other employee welfare benefit plans. Any termination of employment or reduction of hours which would result in loss of coverage under such a plan would trigger continuation coverage rights, unless the termination is due to the employee's "gross misconduct." 29 U.S.C. § 1163(2) (Supp. IV 1986).

143. 29 U.S.C. § 1161(b) (Supp. IV 1986) provides that "if all employers maintaining such plan [i.e., a group health plan] normally employed fewer than 20 employees on a typical business day during the preceding calendar year" the plan shall be exempt from continuation coverage requirements. Employees of smaller employers may find similar coverage under state laws. *See, e.g.*, N.Y. Ins. L. § 3221 (McKinney 1985 & Supp. 1988) which provides for continuation coverage on similar terms to those contained in the ERISA provisions.

group health plan would otherwise cease because of a reduction in work hours as a result of the employee's disability or because the employee has become entirely unable to work, the employee is entitled to elect to continue to participate in the group health plan for up to eighteen months,¹⁴⁴ or until he or she becomes covered under another employer's plan through re-employment or becomes eligible for Medicare.¹⁴⁵ Employers may require their former employees to pay premiums for this coverage, which may not exceed 102 percent of the normal charge for employee participation.¹⁴⁶ If the employer's group health plan contains a conversion option for individual coverage, former employees on continuation coverage must be afforded the option.¹⁴⁷

Many persons affected by AIDS who lose their jobs, therefore, need not lose their health insurance coverage. However, the requirement that the individual pay premiums in order to maintain the coverage may present problems, depending upon the former employee's access to funds for such purposes.¹⁴⁸ Maintaining insurance coverage could also become difficult, especially if the former employee lost his or her job not because of the inability to work, but rather because of discrimination motivated by fear of AIDS. AIDS discriminatees are not prime candidates for rapid re-employment, and may exhaust their eighteen months of continuation coverage as well as unemployment insurance benefits without being able to obtain suitable employment. Furthermore, if not actually disabled or diagnosed with AIDS, they will not be eligible for Medicare coverage. The public welfare system may have to be their last resort.

2. Nondiscrimination Requirements

ERISA section 510 states that employers cannot take adverse actions against employees in order to deprive them of benefits to which they are or may become entitled, and allows persons affected by such actions to bring a federal suit to vindicate their rights.¹⁴⁹ Although section 510 was enacted primarily to prevent

144. 29 U.S.C. § 1162(2)(A) (Supp. IV 1986). If the employer terminates all group health insurance coverage for his or her employees, those former employees on continuation coverage would also cease to be covered. 29 U.S.C. § 1162(2)(B) (Supp. IV 1986).

145. 29 U.S.C. § 1162(2)(D) (Supp. IV 1986). Medicare eligibility for employees under retirement age begins two years after the employee has become eligible for disability insurance under the Social Security system. *See* 42 U.S.C. §§ 1395-1395zz (1982 & Supp. IV 1986).

146. 29 U.S.C. § 1162(3) (Supp. IV 1986). Of course, former employees who fail to pay the premiums will lose their coverage. 29 U.S.C. § 1162(2)(C) (Supp. IV 1986). The former employee is entitled to elect to pay premiums on a monthly basis rather than in a lump sum. 29 U.S.C. § 1162(3) (Supp. IV 1986).

147. 29 U.S.C. § 1162(5) (Supp. IV 1986). Some states require that group health policies sold to employers include conversion privileges. *See, e.g.,* N.Y. Ins. L. § 3221 (McKinney 1985 & Supp. 1988).

148. Persons who live in states which have not followed the federal lead to provide continuation coverage rights for those not covered by the federal law are distinctly disadvantaged in this regard. For those who do not have money to pay for premiums for continuation coverage, state welfare benefits may be a source for premium payments until Medicare eligibility finally occurs 24 months after the employee has become disabled or has been diagnosed with AIDS.

149. *See* 29 U.S.C. § 1140 (1982). In pertinent part, section 1140 provides:

It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan...., or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan... The provisions of section 1132 of this title shall be applicable in the enforcement of this section.

employers from strategically timing employee discharges to prevent employees from attaining rights under ERISA's vesting provisions,¹⁵⁰ it applies broadly to all "employee benefit plans," including all forms of insurance benefits.¹⁵¹ Although most of the case law generated under section 510 pertains to pension issues,¹⁵² there are a few cases which show how section 510 can be relevant to adverse actions against employees affected by AIDS.¹⁵³

The first and most celebrated section 510 employee welfare benefit case is *Folz v. Marriott Corporation*.¹⁵⁴ John R. Folz, the general manager of Marriott's hotel at the Kansas City International Airport, was discharged during the spring of 1981 after revealing to Marriott management officials that he had been diagnosed with multiple sclerosis, a progressive disease of the nervous system.¹⁵⁵ Prior to his diagnosis, Folz had worked for Marriott in various capacities since 1965, and had been repeatedly promoted, praised in work evaluations, and given raises and bonuses.¹⁵⁶ Folz sued

29 U.S.C. § 1132 (1982 & Supp. IV 1986) creates a private right of action for participants or beneficiaries as follows, in pertinent part:

A civil action may be brought— . . . (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.

A similar action may be initiated by the Secretary of Labor upon request of a plan participant or beneficiary, *see* 29 U.S.C. §§ 1132 (a)(5) and (b)(1)(B) (1982). In addition, 29 U.S.C. § 1141 (1982) forbids coercive actions by any person "for the purpose of interfering with or preventing the exercise of any right to which [a plan beneficiary] is or may become entitled under the plan. . . ." The circuit courts are split on whether individual employee actions must satisfy an exhaustion requirement before suing to enforce statutory rights under section 510. *Compare* *Mason v. Continental Group, Inc.*, 763 F.2d 1219 (11th Cir. 1985), *cert. denied*, 474 U.S. 1087 (1986) and *Kross v. Western Electric Co.*, 701 F.2d 1238 (7th Cir. 1983) (both holding exhaustion is required) *with* *Amaro v. Continental Can Co.*, 724 F.2d 747 (9th Cir. 1984) and *Zipf v. American Tel. and Tel. Co.*, 799 F.2d 889 (3d Cir. 1986); *accord*, *Gavalik v. Continental Can Co.*, 812 F.2d 834 (3d Cir.) (exhaustion not required), *cert. denied*, 108 S. Ct. 495 (1987).

I have briefly addressed ERISA issues in the context of AIDS discrimination previously, *see AIDS and Employment Law*, *supra* note 15, at 24–25, 35–36. *See also* Vogel, *Containing Medical and Disability Costs by Cutting Unhealthy Employees: Does Section 510 of ERISA Provide a Remedy?*, 62 NOTRE DAME L. REV. 1024 (1987). Professor Vogel argues at length that section 510 should be seen as a nondiscrimination civil rights statute under which former employees are entitled to relief if they can show that "interference with existing or future benefits rights was a substantial or motivating factor behind the employer's employment decision." *Id.* at 1061. *Accord*, Collingsworth, *ERISA Section 510—A Further Limitation on Arbitrary Discharge*, 10 IND. REL. L. J. 319 (1988).

150. S. REP. NO. 127, 93d Cong., 2d Sess., reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 4838, 4871–72.

151. Section 3 of ERISA, codified at 29 U.S.C. § 1002 (3) (1982), defines "employee benefit plan" to include both employee welfare benefit plans and employee pension benefit plans. "Employee welfare benefit plan" is defined in 29 U.S.C. § 1002(1) (1982) to include "any plan, fund, or program" established or maintained by an employer "for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services," as well as benefits described in the Labor Management Relations Act provisions governing jointly administered union-management benefit plans. *See* 29 U.S.C. § 186 (1982 & Supp. IV 1986).

152. Vogel, *supra* note 149, at 1025 n.6., collects decisions retrievable through published opinions or computer databases through 1986. Research in subsequent decisions has revealed few pertaining to employee benefits other than pensions.

153. In addition to the three cases discussed *infra* text accompanying notes 154–77, *Bishop v. Osborn Transp.*, 838 F.2d 1173 (11th Cir. 1988) is noteworthy. The appellate decision deals solely with the question whether punitive damages can be awarded for a purposeful violation of section 510. The trial court, in an unpublished opinion, found that the employer had purposely altered an employee's date of discharge to interfere with the employee's attainment of medical benefits under an ERISA covered plan. The Eleventh Circuit held that punitive damages were not available.

154. 594 F. Supp. 1007 (W.D. Mo. 1984).

155. *Id.* at 1010–12.

156. *Id.*

Marriott under section 510, alleging that Marriott management had discharged him in order to avoid liability under a variety of employee benefit programs.¹⁵⁷

The court drew an inference of unlawful motivation from the timing of Folz's discharge and from the manner in which the discharge was handled.¹⁵⁸ Folz was placed on "probation" despite the lack of objective dissatisfaction with his work, and the probation was not handled consistently with Marriott's standard practices for managers. In addition, because Marriott's benefit plans were self-funded, the court found that there was a "substantial economic incentive" for Marriott to discharge Folz.¹⁵⁹ Having found that depriving Folz of benefits was a motivating factor in the discharge,¹⁶⁰ the court considered Marriott's defense that the discharge was "for cause," and found it wholly pretextual.¹⁶¹ Not only was Folz's past work record exemplary, but during the final months of Folz's employment as general manager of the Kansas City hotel, the hotel was upgraded to a four-diamond rating by the American Automobile Association, the highest rating for hotel performance.¹⁶²

Noting ERISA's broad authorization of equitable relief, the court performed complex calculations to make Folz whole for lost salary, bonuses, benefits, stock options, and pension rights.¹⁶³ The court included in its calculations front-pay through Folz's expected retirement date (he was 53 years old at the time of the court's opinion, and the court assumed a normal retirement age of 65),¹⁶⁴ and ordered equitable relief with regard to pension and stock plan vesting.¹⁶⁵ The result in the case was quite expensive for Marriott.¹⁶⁶

Two subsequent opinions ruling on motions to dismiss similar claims have reinforced the significance of *Folz*. In *Zipf v. American Telephone and Telegraph Co.*,¹⁶⁷ Monica Zipf, an employee with more than fifteen years seniority, was terminated for "excessive absenteeism" stemming from her rheumatoid arthritis.¹⁶⁸ Under the company's disability benefits plan, Zipf would have been entitled to disability benefits beginning on her eighth calendar day of absence from work. She was discharged on the seventh day. Furthermore, as a senior employee, she would have been entitled under company plans to extended disability benefits had she still been employed on the eighth day of her absence.¹⁶⁹ The district court dismissed her

157. The court specified the following benefits programs relevant to the discharge decision: (1) medical benefits plan, self-funded by Marriott; (2) sick leave plan, providing continued compensation for employees absent from work due to illness; (3) long-term disability and salary continuation plan, also self-funded by Marriott; (4) pension and profit-sharing plan, which provided full vesting after twenty years of employment, but as to which a plan amendment would go into effect January 1, 1982, reducing full vesting time to 15 years; (5) deferred stock bonus plan. *Id.* at 1012-13.

158. *Id.* at 1014.

159. *Id.* at 1014-15.

160. *Id.* at 1015.

161. *Id.*

162. *Id.* at 1011-12.

163. *Id.* at 1015-21.

164. *Id.* at 1018-19.

165. *Id.* at 1019-20.

166. As summarized by the court, the relief ordered included \$88,677 in backpay, \$85,443 in front pay, coverage of past expenses due to lack of benefits coverage, prospective benefits entitlements of uncertain but possibly substantial total value, and attorney's fees. *Id.* at 1021.

167. 799 F.2d 889 (3d Cir. 1986).

168. *Id.* at 890.

169. *Id.*

section 510 claim on an exhaustion theory.¹⁷⁰ The court of appeals overruled the exhaustion holding and remanded for trial,¹⁷¹ noting that Zipf had been told by her immediate supervisor that the reason for her discharge had been to prevent her from qualifying for disability benefits, and that certain memoranda written after the firing to attempt to justify it on other grounds would be admissible and helpful to her case.¹⁷²

In *Bradley v. Capital Engineering & Manufacturing Co.*,¹⁷³ Telitha Bradley, a relatively new employee, was terminated just twelve days before she would have qualified under the employer's medical benefit plan for coverage of a recently discovered medical condition, diverticulitis. The plan provided that employees would become fully covered three months after hiring, except for pre-existing conditions, which would not be covered until after twelve months of service.¹⁷⁴ Bradley, hired in October 1985, incurred significant expenses due to hospitalization for treatment of diverticulitis in July 1986. She claimed the condition was newly discovered by her doctor at that time, more than three months after her hiring, but the company claimed that diverticulitis requiring hospitalization must have been a pre-existing condition, and refused payment. Bradley was subsequently discharged shortly before she would qualify for coverage of pre-existing conditions under the company's plan.¹⁷⁵

The court rejected the company's pre-existing condition defense, ordering payment for the medical expenses Bradley had incurred during the summer of 1986.¹⁷⁶ In addition, the court refused to dismiss the wrongful termination claim despite the company's allegation that Bradley was laid off as part of a general reduction in force that affected more than twenty percent of its employees at the same time.¹⁷⁷

Taken together, these cases show that section 510 can be a powerful tool to combat AIDS related discrimination against employees.¹⁷⁸ In particular, any employer who initiates a mandatory "AIDS testing" program for current employees would immediately be suspected of plotting to avoid AIDS related benefit costs.¹⁷⁹

170. The trial court ruled that Zipf should have filed a claim for benefits under the plan before suing in federal court. *Id.* at 890, 891.

171. The Third Circuit joined the Ninth Circuit in holding that exhaustion of plan remedies is not required when the employee is suing primarily to assert a statutory right arising under section 510. *Id.* at 891-94.

172. *Id.* at 894-95.

173. 678 F. Supp. 1330 (N.D. Ill. 1988).

174. *Id.* at 1332.

175. *Id.* The opinion of the court responds to motions for summary judgement by Bradley and motions to dismiss by the company. Bradley pled in two counts: for reimbursement of her medical expenses and for termination in violation of section 510 of ERISA. *Id.* at 1331-32.

176. *Id.* at 1333-34. The court denied Bradley's request for punitive damages, but awarded "reasonable attorney's fees." *Id.* at 1334-35.

177. *Id.* at 1336-37. The court noted that "plaintiff, at a later stage in this litigation, may incur difficulty substantiating her hypothetical sequence of events demonstrating that defendant's decision to discharge her was motivated by consideration of her benefits rather than a general economic cutback scheme." *Id.*

178. For obvious reasons, section 510 provides no relief to job applicants, since its protections only extend to participants in employee benefit plans, not potential participants.

179. See, e.g., *Gavalik v. Continental Can Co.*, 812 F.2d 834 (3d Cir.), cert. denied, 108 S. Ct. 495 (1987). The Third Circuit held that a company program to systematically cut retirement benefit costs by placing employees on layoff to avoid vesting events, including shifting production between plants in order to minimize vesting liabilities, violated section 510. By analogy, any systematic employer policy undertaken primarily to prevent employees from obtaining benefits to which they would become entitled in the normal course of employment, could violate section 510.

Because of the nature of HIV infection, ARC, and AIDS, employees who encounter adverse treatment would normally be able to work. Therefore, explanations for the adverse treatment (other than explanations based on fear of coworker or customer reactions)¹⁸⁰ would usually be pretextual.

Furthermore, because of the broad equitable power given to federal courts to prevent violations of ERISA,¹⁸¹ and the forward looking language of section 510 itself,¹⁸² preliminary injunctive relief should be available in a section 510 lawsuit to prevent irreparable injury to the employee.¹⁸³

C. *Collective Bargaining Agreements*

For employees who are represented by labor unions, collective bargaining agreements can provide significant help in combating AIDS related job difficulties. The normal method of resolving difficulties in a unionized workplace is through a contractual grievance procedure terminating in binding arbitration by a neutral person selected by the parties. There have been only a handful of reported arbitration decisions involving employees with AIDS, but the reported decisions all indicate that arbitrators will strain to be protective of the rights of an employee affected by a serious disease such as AIDS.¹⁸⁴

The most recent reported decision, *Local 517-S, Production, Services and Sales District Council v. The Bucklers, Inc.*,¹⁸⁵ concerned a flexible machine operator who had been employed for eight years by a picture-frame manufacturer.¹⁸⁶ The employee complained of feeling ill and asked for a transfer from his job, presenting a note from his doctor indicating that he could "perform any type of job, except those requiring lifting or prolonged standing." His job required occasional lifting and prolonged standing. During the ensuing discussion between management and union representatives, the employee was advised to file for disability benefits. The parties later disagreed as to whether termination of employment was also discussed. About two weeks later, the employee returned to the plant with an informally phrased, handwritten doctor's note indicating he could return to work with no activity restriction, which the company rejected as suspicious.¹⁸⁷ A week after that, the

180. In almost all situations, these defenses should be rejected for the same reasons they are rejected under Title VII and handicap discrimination laws. See *Employment Discrimination*, *supra* note 15, at 696-702.

181. 29 U.S.C. § 1132(a)(3) (1982).

182. 29 U.S.C. § 1140 (1982) speaks of prohibiting not only retaliation against employees for their past assertion of rights under benefit plans, but also prohibits discrimination against employees to interfere with the attainment of a right to which the employee "may become entitled" in the future.

183. Such preliminary relief should be available consistent with the ruling in *Chalk v. U.S. Dist. Ct.*, 840 F.2d 701 (9th Cir. 1988), since all the tests for such equitable relief would presumably be the same under section 504 of the Rehabilitation Act and section 510 of ERISA.

184. The earliest significant arbitration decision involving an employee with AIDS was never officially reported. Arbitrator Martin Wagner ordered United Air Lines to offer reinstatement to a flight attendant with AIDS who had not been certified by a doctor as unable to perform his normal duties. See *Employment Discrimination*, *supra* note 15, at 688 n.32.

185. 90 Lab. Arb. 937 (BNA) (1987) (Braufman, Arb.).

186. *Id.*

187. As characterized by the arbitrator:

On or about June 9, according to Mr. [A], the grievant presented to Mr. [F], president of the company, a handwritten note from the union's Medical Center, signed by a Dr. [G], stating: "Mr. [C] may return to work."

employee presented a typewritten note from a different doctor, indicating that he had been diagnosed with AIDS but making no comment about his ability to work. The employee grieved to be returned to work.¹⁸⁸

The arbitrator held that the company was at fault for not "making an effort to ascertain the validity" of the handwritten note it had cursorily rejected, and for apparently terminating the employee in the absence of any direct medical evidence as to his ability to work.¹⁸⁹ The arbitrator ordered the employee reinstated to an unpaid disability leave, and ordered the company and the union mutually to select an "AIDS specialist" to examine the employee and determine whether he was physically able to perform his old job as a Flexible Machine Operator. Actual reinstatement to work would only be ordered if the specialist certified the employee as able to perform the full range of work required by the job.¹⁹⁰

Significantly, the arbitrator did not order the company to find a different job for the employee to perform, or to modify his job duties so that he could perform his old job. The arbitrator made no mention of handicap discrimination law in explaining his decision. The result in the case was similar to a previously published decision which had ordered reinstatement of an employee with AIDS to a disability leave status at a nursing home.¹⁹¹

The decision in *Local 517-S* shows advantages and drawbacks of arbitration as compared to handicap discrimination law in resolving AIDS related employment disputes. One of the main advantages is timeliness; the termination occurred on May

He has no activity restriction." This note obviously being presented to help get the grievant's job back. . . . Mr. [A] testified to the effect that the note's informal appearance, as well as its content, raised a serious question as to authenticity; for which reason Mr. [F] decided to disregard it, and made no attempt at verification.

Id. at 938.

188. *Id.*

189. *Id.* at 939. The arbitrator characterized the "termination" of the employee as "untimely and improper," but stated that he did "not possess any authoritative information . . . on which a proper reinstatement order could be issued." *Id.*

190. *Id.* The arbitrator concluded:

Whether the grievant suffers from some form of AIDS or from some other disease or illness, should be immaterial so far as his employment status is concerned. What is really crucial, in my view, is whether or not, despite his health problem, the grievant is truly capable of doing his job. If he is, then he should be permitted to return to work promptly provided of course, that such return poses no additional health threat either to the grievant or to his co-workers.

Id. The arbitrator's award specified that the AIDS specialist appointed to examine the employee should be "apprised by the parties of the regular duties of a Flexible Machine Operator before he examines the grievant; and, if he certifies him, in writing, to be fit to perform the full range of those duties without jeopardy to himself or his co-workers, then the grievant shall be permitted to resume active duty at the start of the work week next following issuance of the specialist's report. . . ." *Id.*

191. *Nursing Home*, 88 Lab. Arb. (BNA) 681 (1987) (Sedwick, Arb.). The only other reported arbitration decision involving employment rights of persons with AIDS held that a school board had violated its duty to bargain with the union representing teachers when it unilaterally adopted a policy of excluding teachers with AIDS from the classroom. *Cook County Bd. of Educ.*, 89 Lab. Arb. (BNA) 521 (1987) (Witney, Arb.). Two other published arbitration decisions concerned problems with prison guards. In one, the arbitrator ordered reinstatement of a guard who had refused to perform "pat searches" of prisoners without wearing gloves; the arbitrator held that the warden had overreacted and should have addressed the guard's fears through education rather than discipline. *Minnesota Dep't of Correct.*, 85 Lab. Arb. (BNA) 1185 (1985) (Gallagher, Arb.). In the other, the arbitrator ordered the prison to have prisoners tested for HIV infection and report the names of those who tested positive to the guards' union; prisoners had received anonymous testing and the results were withheld from guards, who were frightened because a prisoner had died from AIDS. The arbitrator gave a literal reading to collective agreement language by which the guards were entitled to know about the presence of prisoners harboring contagious conditions. *Delaware Dep't of Correct.*, 86 Lab. Arb. (BNA) 849 (1986) (Gill, Arb.).

22, 1987, and the arbitration award was rendered November 18, 1987.¹⁹² Few other forums can provide such expeditious handling of a litigated case where time is crucial.¹⁹³ More significantly, however, few other forums can provide the degree of flexibility accorded a labor arbitrator in interpreting a labor agreement and fashioning an award, since there is little notion of binding precedent in labor arbitration.

On the other hand, a grievant in arbitration may lose some of the benefits available under handicap discrimination law, especially the affirmative requirement of reasonable accommodation. In *Local 517-S*, the arbitrator's award restricts the right of reinstatement to the employee's former job *if* the employee is found capable of performing all prior job duties, without considering how the company might take steps to accommodate the employee through minor changes in the job or a transfer. Under handicap discrimination laws, the requirement of reasonable accommodation might be interpreted by a court to require such efforts by the company.¹⁹⁴ However, there is nothing to preclude an arbitrator from taking the same approach as handicap discrimination law and imposing some accommodation requirement upon the employer. Consequently, advocates representing employees with AIDS in arbitration should consider presenting the full range of handicap discrimination law arguments to arbitrators.

III. AIDS AND HIRING DECISIONS

Employers may believe that they have good reasons to avoid hiring persons who might be at risk of developing AIDS. Whether the employer is self-insured for health benefits or purchases health insurance, the employer is sure to feel economic consequences from the costs of treatments associated with AIDS. If an employee develops symptoms of ARC or AIDS, accommodation measures are likely to generate some expense. Employees suffering from debilitating and possibly disabling conditions may have a negative impact on workplace morale. The subject of AIDS may arouse fears in other workers. Employers may also fear that their businesses will suffer if word gets out that they employ persons infected with HIV or suffering from ARC or AIDS.¹⁹⁵ AIDS forces upon the workplace the unpleasant subjects of disease and death, which may increase workplace stress. Finally, AIDS will present problems for management, including extra burdens placed on managers to deal effectively with the issues it raises.

192. *Local 517-S*, 90 Lab. Arb. at 937.

193. The major exception, of course, is a court entertaining a petition for temporary or preliminary injunctive relief, as in the *Chalk* case, where the employee with AIDS received the court's mandate to return to work in a matter of a few months (including an appeal of an initially negative decision from the trial judge). Of course, there is nothing to preclude a union from applying to an arbitrator for similar interim relief.

194. Under the facts of the case, the employee might be able to do his job if given an adjustable stool or chair to relieve him from standing throughout the shift, and if given occasional assistance when required to lift a frame. *Local 517-S*, 90 Lab. Arb. at 937.

195. One dramatic example of AIDS fears at work is illustrated by *Stepp v. Indiana Empl. Sec. Div.*, 521 N.E.2d 350 (Ind. App. 1988), in which the Employment Security Division was affirmed in its decision that a laboratory technician was dismissed for cause when she refused to perform certain job tasks involving processing AIDS blood samples due to irrational fears of transmission. Another dramatic example is *Cronan v. New England Tel.*, *supra* note 75, where coworker fears resulted in the constructive discharge of an employee with ARC.

Consequently, it is likely that persons infected with HIV or suffering from ARC or AIDS will face significant difficulty in finding employment if their condition is known to potential employers. It is also likely that many employers will be motivated to use hiring criteria which seek to identify persons who may be at risk of developing AIDS. The two methods most likely to be used are: discrimination on the basis of personal characteristics associated with AIDS, or attempts to require applicants to be tested for HIV antibodies. The former method is probably unlawful with respect to at least some of the relevant characteristics in many jurisdictions; the latter method is expressly unlawful in a few states and arguably unlawful under handicap discrimination laws in most jurisdictions.

A. Screening Applicants for "Lifestyle" Traits

To date, AIDS is associated in the public mind with homosexual men and IV drug abusers.¹⁹⁶ Employers seeking to avoid the complications of AIDS in their workplaces may try to determine the sexual orientation and recreational drug use practices of job applicants in an effort to avoid hiring those people likely to have engaged in behaviors associated with HIV transmission.

Employment discrimination on the basis of sexual orientation is unlawful by local ordinance in many cities and counties in which there are significant numbers of AIDS cases.¹⁹⁷ Such discrimination is also unlawful in Wisconsin¹⁹⁸ and possibly California¹⁹⁹ by virtue of state law. There is some authority that discrimination on the basis of sexual orientation by public employers will be considered unconstitutional in many instances.²⁰⁰

However, all attempts to include sexual orientation discrimination under Title VII of the Civil Rights Act have been unsuccessful due to a narrow view by the

196. The classification of recent immigrants from Haiti as a separate "risk group" early in the epidemic produced significant discrimination in employment against persons in that group. The particular Haitian connection seems to have faded as the epidemic expanded in scope. Increasing publicity for the statistics that AIDS is disproportionately affecting blacks and Hispanics may, however, result in increased discriminatory attitudes towards those individuals when they look for work.

197. There is presently no published source presenting a complete list of such jurisdictions, although at the time of writing the Lambda Legal Defense and Education Fund was compiling a publication which will reproduce in full text the antidiscrimination statutes and ordinances known to exist. The National Gay and Lesbian Task Force was preparing a new edition of a checklist of such jurisdictions first published several years ago. According to an article in *The Washington Blade* on May 27, 1988, reporting the passage of a nondiscrimination ordinance in Baltimore, Maryland, "Baltimore had been one of the few remaining major cities on the East Coast not providing some sort of protection for Lesbians and Gay men. The District [of Columbia], Boston, New York, Buffalo, Philadelphia, and Atlanta have passed similar legislation." Parker, *Civil Rights Focus Fuels Baltimore Bill's Victory*, *The Washington Blade*, May 27, 1988, at 1, col. 1. Another source lists 61 U.S. cities and counties that have some form of gay rights ordinance, but not all such ordinances cover private sector employment, and the list is not documented in any way. L. RUTLEDGE, *THE GAY BOOK OF LISTS* 151-53 (1987). A brief and incomplete list of such jurisdictions is given in LARSON, 3 *EMPLOYMENT DISCRIMINATION* § 110.30 (1988)98. Wis. STAT. ANN. §§ 111.31-111.395 (West 1988).

199. 69 Op. Att'y Gen. Cal. 80 (1986).

200. *Watkins v. U.S. Army*, 837 F.2d 1428 (9th Cir. 1988) (sexual orientation is a suspect classification for purposes of fifth amendment equal protection challenge to military regulations barring enlistment of gays) *reh'g en banc ordered*, 847 F.2d 1362 (9th Cir. 1988); *High Tech Gays v. DISCO*, 668 F.Supp. 1361 (N.D. Cal. 1987) (special procedures for investigating security clearances of gay applicants violate equal protection rights; sexual orientation is at least a quasi-suspect classification); *but see Padula v. Webster*, 822 F.2d 97 (D.C. Cir. 1987) (classifications based on sexual orientation not subject to heightened scrutiny, since conduct "defining" classification is not constitutionally protected).

federal courts of what constitutes sex discrimination,²⁰¹ and no proposal to add the phrase "sexual orientation" at appropriate points in Title VII has gotten as far as a floor vote in either house of Congress. Thus, a large portion of the population lives in jurisdictions where such discrimination remains lawful and may not be subject to legal challenge.²⁰² Furthermore, temporary injunctive relief is probably not available in connection with a complaint of unlawful refusal to hire. Therefore, the efficacy of such laws in securing actual employment for individuals (as opposed to compensation for the unlawful refusal to hire) is limited, given the delays which normally accompany civil rights litigation.

Refusals to hire current drug users present a difficult problem of interpretation under handicap discrimination laws. The Rehabilitation Act treats drug addiction as a handicapping condition, but makes a large exception to the law's protection for a drug abuser "whose current use . . . prevents such individual from performing the duties of the job in question or whose employment, by reason of such current . . . drug abuse, would constitute a direct threat to property or the safety of others."²⁰³ Consequently, employers who sought to exclude IV drug users from their workplaces could do so if they could show that current drug abuse would present a threat to property or safety, not an insurmountable task with regard to a wide variety of occupations. The protections of the Act have proven more useful to former addicts who have been rehabilitated because the Act also protects those with a record of an impairment and the exclusionary language with regard to drug abuse only applies to current abusers, not former abusers.²⁰⁴ Because of the significant time which may exist between infection and development of ARC or AIDS, employers might be tempted to avoid hiring former as well as present drug abusers, but the Act's protection should be available for the reformed abusers.²⁰⁵

B. *Screening Applicants for HIV Infection*

The use of current antibody tests to screen job applicants for AIDS has been thoroughly addressed by the leading authority on medical screening of workers, Professor Mark Rothstein.²⁰⁶ In essence, Professor Rothstein contends that such testing would violate handicap discrimination laws in most instances, given the current understanding of HIV transmission and the various workplace risks flowing from that understanding, because testing would readily lend itself to employment

201. *E.g.*, *DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327 (9th Cir. 1979); *Smith v. Liberty Mutual Ins. Co.*, 569 F.2d 325 (5th Cir. 1978); EEOC Compl. Man. (CCH) ¶ 6495 (1976).

202. Employers who try to avoid hiring gay men covertly by routinely refusing to hire single men may, however, run afoul of almost universal federal and state law bans on discrimination on the basis of sex, as well as the laws which forbid discrimination on the basis of marital status in many jurisdictions. *E.g.*, N.Y. Human Rights Law, N.Y. EXEC. LAW § 296 (McKinney 1982).

203. 29 U.S.C. § 706(B) (Supp. IV 1986).

204. *Id.*

205. Some state handicap discrimination laws provide similar protections for current or former drug abusers.

206. Rothstein, *Screening Workers for AIDS*, in *AIDS AND THE LAW: A GUIDE FOR THE PUBLIC* 126 (H. Dalton & S. Burris eds. 1987) [hereinafter Rothstein I]; see also Rothstein, *Medical Screening of Workers: Genetics, AIDS and Beyond*, 2 LAB. LAW 675 (Fall 1986) [hereinafter Rothstein II]. For an excellent recent description of available HIV antibody test technology, see Thomas, *The Perils of AIDS Testing*, 11 LOS ANGELES LAW. No. 6, at 39-46 (Oct. 1988).

decisions which violate the handicap discrimination laws.²⁰⁷ In addition, as previously noted, a few jurisdictions have passed laws which expressly forbid such testing for employment purposes.²⁰⁸ Finally, testing generates records of infection which could create employer liability if not treated with adequate respect for confidentiality.²⁰⁹

A new development which postdates Professor Rothstein's treatment of the issue is the decision in *Glover v. Eastern Nebraska Community Office of Retardation*,²¹⁰ holding unconstitutional a mandatory HIV antibody testing program for employees of a state agency providing services to the mentally retarded. Chief Judge Strom of the Federal District Court for the District of Nebraska concluded that such a testing program would implicate serious fourth amendment questions involving personal privacy. Relying on *Schmerber v. California*²¹¹ for the proposition that individuals "have a reasonable expectation of privacy in the personal information their body fluids contain,"²¹² the court applied a balancing test, weighing the employees' "reasonable expectations of privacy" as against the employer's "interest in a safe training and living environment for all developmentally disabled persons receiving services from the agency."²¹³ Since all pertinent medical evidence indicated that there is no necessity to exclude infected persons from employment in the agency to satisfy the employer's interest, the court determined that the testing policy marked an unreasonable intrusion into the privacy rights of the employees.²¹⁴

Glover is especially important because all past challenges to government "AIDS testing" programs for applicants and employees have failed.²¹⁵ The *Glover* opinion makes clear that attempts to justify "AIDS testing" for applicants or employees by arguments based on public health concerns will receive careful scrutiny from the

207. Rothstein I, *supra* note 206, at 128-29, 135-39. Professor Rothstein additionally stresses the accuracy problems of currently available tests for HIV screening by employers, as well as the uncertainty of the meaning of test results. *Id.* at 129-34. It is likely that advancing technology in testing and increasing knowledge of the natural history of HIV infection will decrease the salience of this portion of his analysis of the issue, particularly if tests suitable for large-scale screening are licensed which can directly detect HIV infection as opposed to detecting antibody formation.

The writer of this article has also previously commented on the testing question. See *AIDS and Employment Law*, *supra* note 15, at 42-50; *Handicapping Condition*, *supra* note 15, at § 12.04.

208. See *supra* text accompanying notes 79-89.

209. *AIDS and Employment Law*, *supra* note 15, at 49-50.

210. 686 F.Supp. 243 (D. Neb. 1988).

211. 384 U.S. 757 (1966).

212. *Glover*, 686 F. Supp. at 250.

213. *Id.*

214. *Id.* Curiously, the opinion does not mention the Rehabilitation Act at all. Presumably, a state mental retardation agency would receive some form of federal funding, if only social welfare payments under Medicare for some of its clients, thus subjecting its policies to section 504 nondiscrimination requirements, but the court does not address the issue.

215. In *Local 1812, Am. Fed. of Gov't Employees v. U.S. Dep't of State*, 662 F. Supp. 50 (D.D.C. 1987), the court held that the unusual circumstances presented by overseas employment in the foreign service made it reasonable, and thus constitutional, for the State Department to test applicants and current foreign service employees and their dependents for HIV infection and to exclude not only those who tested positive but also those whose dependents who would accompany them to overseas postings had tested positive. *Id.* at 53. A significant distinction between *Local 1812* and *Glover* is the articulated reason for the testing: in *Local 1812*, the court found that the reason for the program was ascertaining "fitness for duty," as opposed to "stopping the spread of HIV infection." *Id.* In *Glover*, the purpose was the latter. *Glover*, 686 F. Supp. at 247.

Challenges to the military testing programs have failed for similar reasons. *Batten v. Lehman*, No. CA 85-4108 (D.D.C., Jan. 18, 1986), see 1 AIDS Pol'y & L. (BNA) No. 1, at 3 (Jan. 29, 1986) (upholding discharges of Naval personnel who tested positive).

federal courts when public sector jobs are involved. While constitutional privacy interests do not apply in the private sector, the *Glover* opinion may at least provide a model for private sector decision makers who wish to acknowledge the civil rights of individuals in the private workplace, and certainly for legislators considering whether to ban HIV antibody testing by employers.

C. *Affirmative Assistance for Seropositive Jobseekers*

Sections 501 and 503 of the Rehabilitation Act²¹⁶ require federal government agencies and federal contractors to undertake affirmative action to employ qualified handicapped individuals.²¹⁷ State and local statutes and ordinances in many jurisdictions impose similar affirmative action obligations. It would be most appropriate, in light of the special problems people affected by AIDS encounter in obtaining employment, for government agencies and contractors to contact AIDS service organizations for referrals of qualified clients who need employment and are able to work. While a refusal by a federal contractor to hire or continue to employ a particular person with AIDS may not by itself constitute a violation of the statutory affirmative action obligation,²¹⁸ a systematic refusal by agencies or contractors to entertain employment applications from persons affected by AIDS would clearly be unlawful.²¹⁹

IV. EMPLOYEE BENEFITS FOR EMPLOYEES WITH AIDS

As new medications make it possible for persons with AIDS to continue working for longer periods of time, the issue of their entitlement to continued benefits will assume even greater importance. AIDS is an expensive condition. A recent review by Daniel M. Fox and Emily H. Thomas of various studies of AIDS medical costs concluded that "[t]he lifetime cost of medical care for persons with AIDS is comparable to the more expensive other acute illnesses."²²⁰ AIDS presents a special challenge to employee benefit plan funding assumptions because the expenses occur among a population which was not predicted to experience such costs when funding

216. 29 U.S.C. §§ 791, 793 (1982).

217. See 41 C.F.R. §§ 60-1.1-60-1.47, 60-741.1-60-741.30 (1987) (describing affirmative action obligations of contractors and subcontractors for handicapped workers).

218. Or so the Office of Federal Contract Compliance Programs apparently found in the case of John Chadbourne, Raytheon v. Fair Empl. and Housing Comm'n, 46 Fair Empl. Prac. Cas. (BNA) 1089, 1097 (Cal. Super. Ct. 1988).

219. While systematic refusal to hire a particular group of handicapped individuals may run afoul of the affirmative action requirements of section 503, it may be difficult for an individual discriminatee to secure relief. Because there is no private right of action under section 503 (see *Hodges v. Atchison, T. & S. Fe Ry.*, 728 F.2d 414 (10th Cir.), cert. denied, 469 U.S. 822 (1984)), the discriminatee's sole remedy is to complain to the Labor Department's Office of Federal Contract Compliance Programs, which is not noted for aggressive enforcement of nondiscrimination requirements. The Watkins draft report to the President's Commission on the HIV Epidemic recommends strengthening of the federal antidiscrimination enforcement effort under existing limited laws, such as sections 503 and 504 of the Rehabilitation Act, pending passage of comprehensive private sector antidiscrimination coverage at the federal level. See Daily Lab. Rep. (BNA) No. 107, at D-1 (June 3, 1988).

220. Fox & Thomas, *AIDS Cost Analysis and Social Policy*, 15 LAW, MED. & HEALTH CARE 186, 195 (Winter 1987/88). Table 7 of the appendix to the Fox & Thomas article showed a \$50,000 lifetime hospital cost for AIDS compared to \$158,000 for end-stage kidney disease patients on dialysis, \$68,700 for paraplegia from an auto crash, \$66,800 for myocardial infarction in men of middle age, \$47,500 for cancer of the digestive system in men of middle age, and \$28,600 for leukemia in men of middle age. The last year of life for cancer patients was shown to generate an average cost of \$30,300, compared to final year hospital costs in AIDS of roughly \$20-25,000. *Id.* Table 7, at 206.

mechanisms were designed before the advent of AIDS. Consequently, insurance premiums or self-insurance expense forecasts were made without providing for AIDS, and insurers and companies are being called upon to assume costs for which they had not planned.

While most insurance companies and self-insurers seem to have paid benefits without protest during the early years of the epidemic, the mounting caseload has provided incentives for future cost avoidance. Some insurance companies are trying to issue new group policies with exclusions or caps for AIDS related benefits, and some self-insured companies are also attempting to exclude or limit AIDS related expenses from coverage.²²¹

The most dramatic example of this phenomenon was reported in national media during August 1988. The *Wall Street Journal* reported on August 5 that Circle K Corporation, described as the nation's second largest convenient store chain, had sent a letter to employees dated January 1, 1988 announcing a new policy of terminating medical coverage of employees who became sick or injured as a result of AIDS, alcohol, drug abuse, or self-inflicted wounds.²²² Circle K, which is self-insured, defended its policy as necessary to protect the benefits of other employees. The company maintained that it would be unfair for those other employees to subsidize employees whose medical expenses were due to their "life-styles."²²³ The glare of media attention and criticism led Circle K to quickly rescind its policy,²²⁴ but the issue is sure to recur.

Whether employer exclusions or restrictions on AIDS coverage can successfully be subjected to legal challenge depends upon the nature of the employer's benefit plans and the sources of the employer's income. As to the latter, if the employer derives income from federal grants or contracts, AIDS restrictive programs might be subject to challenge under the Rehabilitation Act.²²⁵ If the employer provides health benefits by purchasing insurance for employees, state insurance laws and regulations may be applicable. If the employer is self-insured, ERISA pre-emption²²⁶ divests state and local governments from regulating the provision of benefits, except to the extent such regulations merely enforce the requirements of Title VII of the Civil Rights Act of 1964.²²⁷

221. In addition to the Circle K benefits policy, discussed below, an administrative complaint was filed early in 1988 by National Gay Rights Advocates against a Florida real estate developer which changed insurance plans when an employee contracted AIDS so as to put a low lifetime cap on AIDS related benefits. See *Complaint Charges Employer in Health Plan Adoption*, 3 AIDS Pol'y & L. (BNA) No. 4, at 4-5 (Mar. 9, 1988).

222. Noble, *Health Insurance Tied to Life Style*, N.Y. Times, Aug. 6, 1988, at 1, col. 5.

223. *Id.*; Kramon, *Business and Health: Curbing Costs of 'Life Style' Ills*, N.Y. Times, Aug. 9, 1988, at D2, col. 1. Kramon's article points out that Circle K's "lifestyle" policy was curiously selective, since smoking is a lifestyle choice that generates significant employee health benefit expenses but was not mentioned in the list of causes for exclusion from benefits.

224. Noble, *Company Suspends Insurance Cut-Off*, N.Y. Times, Aug. 12, 1988, at A8, col. 1; *Circle K Drops Proposal To Limit Health Benefits*, Wall St. J., Sept. 9, 1988, at 3, col. 3.

225. 29 U.S.C. §§ 793, 794 (1982 & Supp. IV 1988).

226. 29 U.S.C. § 1144(a) (1982).

227. 42 U.S.C. §§ 2000e-2000e-17 (1982 & Supp. IV 1986).

Taking first the issue of federal handicap discrimination law, it is logical to assume that if refusals to hire or continue to employ individuals because of their affliction with AIDS violate handicap discrimination law,²²⁸ differential treatment of employees under benefit plans because of the nature of their handicapping condition (i.e., AIDS) would likewise violate the law. If an employer responds that the differential treatment has a bona fide economic justification due to the expense of AIDS, it should be sufficient to rebut that argument by showing studies, such as the Fox and Thomas study,²²⁹ which conclude that AIDS treatment falls in the expense range of other serious illnesses normally covered by employee benefit plans. Consequently, employers subject to the requirements of the Act would probably be subjecting themselves to liability under the Act if they failed to provide medical benefits to employees with AIDS on the same basis as benefits are provided to employees with other illnesses.²³⁰

Employers who are not subject to the Act may still be subject to nondiscrimination requirements imposed by state and local handicap discrimination ordinances, but those requirements probably would not be enforceable with respect to employee benefit plans because of ERISA pre-emption. In *Shaw v. Delta Air Lines, Inc.*,²³¹ the Supreme Court ruled that a New York sex discrimination law which had been construed by that state's highest court to forbid denial of health benefits on account of pregnancy²³² was pre-empted by ERISA. Writing for the Court, Justice Blackmun noted that ERISA broadly pre-empted all state laws that "relate to any employee benefit plan," the only exceptions being laws regulating insurance, banking or securities, or state criminal laws.²³³

However, Justice Blackmun also noted that ERISA's pre-emption provision expressly does not "alter, amend, modify, invalidate, impair, or supersede any law of the United States. . . ." ²³⁴ Title VII continues to apply to employee benefit plans *in pari materia* with ERISA. Since Title VII enforcement provisions include a procedure for deferring cases to state agencies with authorizing statutes similar to Title VII,²³⁵ state employment discrimination laws would not be pre-empted by ERISA to the extent they covered the same practices forbidden by Title VII.²³⁶

228. See *supra* text accompanying notes 16-131.

229. See *supra* note 220.

230. In this regard, the Rehabilitation Act requirements would be analogous to those imposed by the Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) (1982), which requires employers to cover pregnancy on the same basis as other disabilities under employee benefit programs.

231. 463 U.S. 85 (1983).

232. *Brooklyn Union Gas Co. v. New York State Human Rights Appeal Bd.*, 41 N.Y.2d 84, 359 N.E.2d 393 (1976).

233. *Shaw*, 463 U.S. at 91.

234. *Id.* (quoting 29 U.S.C. § 1144(d)).

235. *Id.* at 100-02. In particular, see 42 U.S.C. § 2000e-5(b) and (c) (1982).

236. *Shaw*, 463 U.S. at 102-04. This narrowing construction of ERISA pre-emption did not save the New York law in *Shaw*, however, because that case dealt with discrimination determinations made prior to the enactment of the Pregnancy Discrimination Act of 1978, 92 Stat. 2076, 42 U.S.C. § 2000e(k) (1982). At that time, refusals by employers to cover pregnancy under their employee benefit plans were not considered unlawful sex discrimination under Title VII, as construed by the Supreme Court in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976). Consequently, due to ERISA pre-emption of state law, New York could not require employers to cover pregnancy until such coverage was required under Title VII on the same basis as coverage of other disabilities. *Shaw*, 463 U.S. at 104-06.

Consequently, if AIDS exclusionary practices under employee benefit plans could be shown to discriminate unlawfully under Title VII, both the Federal Equal Employment Opportunity Commission and state and local fair employment practices commissions would have jurisdiction to deal with the ensuing complaints.

The characteristics of persons with AIDS are such that Title VII disparate impact arguments can be made. AIDS, particularly in large urban areas, disparately affects persons of color and Hispanic Americans, and in the United States, persons with AIDS are overwhelmingly male. Any employer policy which seeks to limit or exclude coverage for AIDS related conditions would thus have the effect of disparately disadvantaging male and minority employees, bringing into play Title VII and state and local prohibitions against discrimination in terms and conditions of employment on the basis of race, color, national origin, and sex.²³⁷

At least one administrative decision has been reported embracing this theory of liability. The Oregon Civil Rights Division ruled on January 9, 1988 that an employer's exclusion of AIDS coverage unlawfully discriminated against male employees.²³⁸ The employer was self-insured and not subject to the Rehabilitation Act's provisions. The Division reasoned that "because more than 90 percent of those infected with AIDS are males (in Oregon and nationally) leads this agency to find that respondent's exclusion of AIDS disparately impacts males in denying employees an employment benefit."²³⁹ The ruling came after initial investigation, and was not a final appealable ruling, so it may be some time before a judicial determination can be obtained.

The Oregon decision seems conceptually sound, if not phrased with particular felicity. There are many medical conditions that are endemic to particular sexual or racial groups, and general health insurance programs which selectively exclude particular illnesses normally identified with particular groups are clearly discriminatory. Unfortunately, the lack of express federal protection against discrimination on the basis of sexual orientation leaves unprotected the largest single population group identified with AIDS, gay men, and it may be that some administrators and judges may accept the defense argument which the Oregon commission rejected: that the employer's policy did not disparately impact men as such, but rather impacted a subgroup of men defined by certain risk behaviors. This argument is closely

237. When a plaintiff has established a prima facie case of disparate impact, the defendant has the burden of showing that the criterion or policy which has that impact is job-related. *See generally* New York City Transit Auth. v. Beazer, 440 U.S. 568 (1979); Dothard v. Rawlinson, 433 U.S. 321 (1977); Griggs v. Duke Power Co., 401 U.S. 424 (1971) (cases establishing disparate impact theory under Title VII and setting forth rebuttal burdens of employers). It would seem difficult for employers to establish that the exclusion of coverage for AIDS under their employee benefit plans bears any particular relationship to necessary job functions, but care must be taken in laying the foundation for a disparate impact case. In *Beazer*, the Court established a stiff requirement for statistical evidence adequate to make out a prima facie case of disparate impact; statistics must show that a particular policy has a disparate impact in the employer's own workforce, not just in the "general population." *See Beazer*, 440 U.S. at 584-87. *See generally*, Note, *supra* note 59.

238. *See Exclusion of Insurance Held to Discriminate Against Men*, 3 AIDS Pol'y & L. (BNA) No. 2, at 5-6 (Feb. 10, 1988). The case, in which the respondent was M.F. Salta Co., Inc. and affiliates, which operates a Nissan dealership in Beaverton, Oregon, is identified as Oregon Civil Rights Division, Bureau of Labor, Case EM-HP-870108-1353.

239. *Id.* at 6.

analogous to the argument by which the Supreme Court initially ruled that exclusion of pregnancy disability benefits did not constitute unlawful sex discrimination.²⁴⁰

If policy makers want to ensure that employee benefit plans pick up a fair share of the costs of AIDS when they fall upon persons who are employed, they will have to take steps either to extend Title VII protection to disabled persons, or enact specific federal legislation forbidding exclusion or excessively low capping of AIDS related benefits so as to avoid the problems created by ERISA pre-emption.

Employers who provide medical benefits to their employees by the purchase of insurance policies are in a different legal situation altogether. ERISA specifically does not pre-empt state and local laws which regulate the sale and marketing of insurance, so actions by state insurance commissioners may proceed upon charges of improper exclusion of benefits for AIDS. In New York, for example, in addition to statutory provisions forbidding discrimination by insurers on the basis of race, color, creed, and national origin,²⁴¹ or sex and marital status,²⁴² regulations prescribing the minimum required coverage under health insurance policies forbid the exclusion of particular diseases, presumably under the theory that exclusions of particular diseases would undermine the very purpose of having general health insurance policies.²⁴³

The issue of employee benefits and AIDS raises once again the question whether a modern industrial society, such as the United States, can continue to function without some form of national health insurance structure going beyond care for the indigent. Employers understandably seek to avoid having to pay the bill for expensive illnesses which are not occupationally related, and a national health insurance scheme would undoubtedly be more efficient than an employee benefits scheme as a mechanism for spreading AIDS related medical costs over the largest population base. However, as long as Congress remains resistant to enacting such a scheme, the burden will have to fall on employment related benefits programs, and gaps in the legal framework for ensuring equitable treatment of employees covered by such plans will have to be addressed.

V. CONCLUSION

The workplace has played a central role in the developing law surrounding AIDS. The initial legal developments have concerned the rights of workers affected by AIDS to continue working, but as the epidemic expands and evolves additional issues will naturally arise. These additional issues will include the rights of workers to continue to benefit from employment related programs such as disability insurance, salary continuation, and health insurance. Also included will be the rights of unemployed persons to receive fair consideration of their employment applications

240. See *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976).

241. N.Y. INS. LAW § 2606 (McKinney 1985).

242. *Id.* at § 2607.

243. See 11 N.Y. COMP. CODES R. & REGS. § 52.16(c) (McKinney 1985), which provides, *inter alia*, "No policy shall limit or exclude coverage by type of illness, accident, treatment or medical condition . . ." with certain exceptions not relevant to the issue of AIDS exclusions.

when they are infected by HIV or actually diagnosed with ARC or AIDS, or are perceived to be persons at risk for AIDS.

Existing laws should play an important role in accommodating the needs of these people, but the laws can only be effective if those charged with administering them are given the necessary support to do an effective job. Civil rights agencies, notoriously underfunded and understaffed, must take on significant new burdens, including prompt applications for temporary injunctive relief in cases which cannot be settled, if the statutory protections for people with AIDS are to be more than merely symbolic.

It is in the interest of society to interpret and apply employment laws relevant to the AIDS situation in a liberal spirit because nobody benefits if the hundreds of thousands (perhaps even millions) of persons affected by HIV or AIDS become an unemployable class, deprived of the economic and social support systems of the workplace. Public health needs provide no justification for excluding persons infected by HIV from the workplace. Also, the latent homophobia and racism which contribute to discrimination against persons affected by AIDS should not be allowed to detract from rational public policy in the face of this epidemic.²⁴⁴

244. The draft report of Admiral Watkins, Chairman of the President's Commission on the HIV Epidemic, released just days before the first draft of this Article was completed, is exemplary of the rational employment law reforms that are needed to ensure adequate protection from discrimination for persons affected by HIV and AIDS. Relevant portions of the draft are available in *Daily Lab. Rep. (BNA)* No. 107, at D-1 (June 3, 1988). The full Commission removed portions of the draft critical of the Reagan Administration's approach to AIDS issues, but a majority of the Commission approved retention of the major policy recommendations relevant to employment. 3 *AIDS Pol'y & L. (BNA)* No. 12, at 2 (June 29, 1988).